158-505

No. 262. October Term, 1894.

IN THE

Supreme Court of the United States.

E. W. Clark, Appellant,

vs.

Charles Reeder, Appellee.

Appeal from the Circuit Court of the United States for the District of West Virginia.

CERTIFIED COPIES OF THE DEPOSITIONS

OF

H. P. CAMDEN,
JOS. A. JONES and
C. C. WATTS,

In the District Court of the United States for the District of West Virginia, taken in the above-entitled case, and filed in the District Court of the United States for the District of West Virginia and omitted from the Record of this case.

THE SUN JOB PRINT, BALTO.

IN THE

Supreme Court of the United States.

OCTOBER SESSION, 1894.

E. W. CLARK, *Appellant*,
vs.
CHARLES REEDER, *Appellee.*
No. 262.

Appeal from the Circuit Court of the United States for the District of West Virginia.

TESTIMONY OF H. P. CAMDEN, JOSEPH A. JONES AND C. C. WATTS—OMITTED FROM THE RECORD FILED.

By consent of all parties, H. P. Camden, a witness of lawful age, appeared at the office of C. C. Watts, in Charleston, on the 16th day of September, 1887, and being duly sworn, answered and deposes as follows, on behalf of the defendants:

Present, James H. Ferguson for E. W. Clark.

Present, W. A. Quarrier for Charles Reeder.

Question 1st, by C. C. Watts.—State your age, name, residence and occupation.

Answer.—I am 29 years old; name H. P. Camden; live in St. Paul, Minn.; I am a lawyer by trade.

Question 2 by same.—Where did you reside in March, 1884, and with whom were you associated in the practice of law?

Answer.—I resided in Parkersburg, W. Va., and I was in partnership with James H. Ferguson in the practice of law.

Question 3 by same.—Please state *whether, during the month of March,* 1884, *you visited the counties of* BOONE, WYOMING AND LOGAN in company with Mr. Watts; if so, state the occasion of your visit, and at whose instance you made such visit.

Answer.—I went to these counties with Mr. Watts in the latter part of February, or along the 1st of March, 1884, I can't say positively which, *at the request of Judge Ferguson. The purpose of my trip was to examine into the matters of record touching the title to the Dillon Survey, I believe it was called, then claimed to be owned by Charles Reeder, and also to secure evidence of possession for the period of limitation; I believe it was for ten years, under Charles Reeder. My instructions were in writing, and stated definitely the object of my trip.*

Question 4 by same.—Please take the paper which I now hand you, headed "Memorandum," and state in whose handwriting the same is, at whose instance and dictation the same was written, as also when and where written, and file the said paper as a part of your deposition.

Answer.—It is my own handwriting, and was written at the request and at the dictation of Judge James H. Ferguson immediately upon starting on our trip to the counties above mentioned. It was written in the office of Watts & Kennedy, in the city of Charleston. *It contains the instructions above referred to by me, as showing the object and purpose of my trip, and I herewith file the same as part of my deposition, marked exhibit H. P. C. No.* 1.

The memorandum on the margin of the paper containing these words, "None," "Found," "Shown," and the memoranda on the back containing the following words, "17th day of September, 1869, Md. & W. Va. M. M. Cos., deed of trust," and "Book O, page 135, Kanawha County," were written by me to aid my memory in regard to the matter contained in the dictated memorandum. I wrote the above words at the time of making the examination of the records in Boone and Wyoming Counties.

Question 5 by same.—Is all the rest of the memorandum, including the last four lines thereof, in your hand-writing, and at the dictation of Judge Ferguson?

Answer.—It is all in my hand-writing, and my recollection is that the last four lines written in lead pencil were added at the dictation of Judge Ferguson, upon reading the memorandum over, after the part in ink was written.

Question 6 by same.—Please state what investigation and examination you made of the records in the different counties visited aforesaid?

Answer.—*I went first to the County of Boone and examined the records there, pursuant to the plan mapped out for me in the written memorandum of instructions. I examined thoroughly into the title of Theron Merritt, and I also, as I remember, traced part of the title, and may be all of it, to the portion of the Reeder land in Boone County. I also investigated the matter of liens and leases.* I think this is all I did in this county. I made about the same examination in Logan County, except I don't think I examined into the title of Theron Merritt in that county. I have an indistinct impression of finding a piece of land charged on the records in the name of some Merritt, too, but as I recollect, it was near the mouth of Buffalo Creek, which was said not to be near the Reeder survey, and I made no further examination into it.

In Wyoming County I followed my instructions strictly, and, I think, made examination into other matters that I

learned there possibly might affect the title, but I can't say now just what these were. I know there was something that I was not satisfied with, and I remained over there a day or two longer for the purpose of satisfying myself, while General Watts went ahead to obtain affidavits from tenants of Reeder, living on the land, in proof of their possession.

Question 7 by same.—Please take the paper I now hand you and state in whose writing the same is, and if in yours, when and where written, and also whether the contents of said paper were shown or made known to Judge Ferguson, your partner, upon your return from said trip? Also, please file said paper with and as part of your deposition.

Answer.—The paper is in my handwriting. It was written in the County Court Clerk's Office of Boone County at the time I was examining the records there in reference to the matter above set forth. I made a full report of the result of my investigation, including the matter contained in this paper, to Judge Ferguson immediately on my return from these counties, and left said papers with him. I herewith file said paper as part of my deposition, marked H. P. C. No. 2. I came back in company with Gen'l C. C. Watts, and we went together to the house of Judge Ferguson before coming to the city of Charleston. I was riding Judge Ferguson's horse at the time. We arrived some time in the afternoon; found Judge Ferguson at home, and I submitted a report of the result of my investigation to him then and there. General Watts read to him the affidavits of possession he *had obtained, and Judge Ferguson expressed himself as satisfied with the title, and said he would approve it. He told General Watts that he could so telegraph Major Bell. Judge Ferguson, according to my best recollection, said he would write out the opinion, approving the title and get me to copy it. General Watts said he would come over in the morning and write it out for him; this was finally agreed to. I think General Watts and I left Judge Ferguson together and came to town.*

Question 8, by same.—Please state whether, during the conversation referred to by you, as having occurred at Judge Ferguson's house, any information was given by Mr. Watts, or any conversation had respecting an inter-lock, between the Dillon and the Rutter and Etting surveys?

Answer.—I do not remember to have heard anything said by Gen'l Watts, about any inter-lock between these two surveys at that time, or at any time at Judge Ferguson's house.

Question 9, by same.—Please state, if you recollect, just before our leaving for the counties aforesaid, while in the office of Watts and Kennedy, with Judge Ferguson and myself, whether or not you wrote a memorandum for Judge Ferguson, of information Judge Ferguson desired me to get from the Clerk of Raleigh county respecting the Reeder title?

Answer.—My best recollection is that some information was desired from the records of that county and Judge Ferguson thought it would be necessary to send some one there, but I think they finally agreed to write to the clerk, and it seems to me that the letter was written then and there. I don't remember who wrote it. I am not positive that the letter was written, but that is my impression now.

Question 10 by same.—What information, if any, did you get from Judge Ferguson before starting, as to a conflict between the lands of Merritt and Reeder, or as between Rutter and Etting and the Dillon surveys, at or about the time of your making your said memorandum of instructions? You will also please state any thing that Mr. Watts may have said, if any thing, upon the same subject, in that connection, and did you learn anything from what you deemed a reliable source while making said investigation of the Boone County records, as to any line or corner of the Rutter and Etting survey with reference to where the said line ran or

said corner was situated, and if you obtained any impression or information as to an inter-lock between the Rutter and Etting and Dillon surveys, please state to what extent you understood it prevailed.

Objection.—The plaintiff's counsel objects to so much of the foregoing question as calls for the impressions, opinions and understandings of the witness, and to every thing contained in the question which calls for any answer outside of what he knows of his own knowledge, or of what he learned from the records.

Note.—Counsel C. C. Watts here stated that, in view of the objection made by Judge Ferguson, he would withdraw the last above question, and that the witness need not answer the same.

CROSS-EXAMINATION BY JAMES F. FERGUSON.

Question 1 by J. H. Ferguson.—Look at the abstract of title, under which the defendant, Charles Reeder, claims the Dillon survey, dated March 22, 1884, signed by J. H. Ferguson, attorney-at-law, Charleston, West Virginia, and if you know, state whose hand-writing it is, except the signature at the bottom?

Answer.—It is in the hand-writing of Gen'l C. C. Watts.

Question 2 by same.—Look at the memorandum, H. P. C., No. 1, and state if the portion thereof, that is stricken out, was so stricken out before you made your trip to Boone and the other counties?

Answer.—It was stricken out before.

Question 3 by same.—What did you do with your said memorandum Ex. H. P. C., No. 1, on your return from the trip to those counties, if you remember?

Answer.—I left all the papers I had with Judge J. H. Ferguson.

RE-DIRECT.

Question 1 by C. C. Watts.—In your answer to the first question, on cross-examination, you state that the abstract of

title therein referred to, except the signature at the bottom, is in the hand-writing of Mr. Watts, please now state in whose handwriting the signature, James H. Ferguson, attorney-at-law, Charleston, West Virginia?

Answer.—It is in the hand-writing of Judge J. H. Ferguson.

And further this deponent saith not.

H. P. CAMDEN.

WITNESS FEES.

2 days	$ 3 00
700 miles mileage	70 00
	$73 00

At the same time and place appeared JOSEPH A. JONES, a witness of lawful age, who being duly sworn answers as follows, on behalf of defendant:

Question 1, by C. C. Watts.—State your name, age, residence and occupation.

Answer.—I am 35 years old; name, Joseph A. Jones, Charleston, W. Va.; am a carpenter by occupation.

Question 2, by same.—Please state in whose handwriting question 51 and the answer thereto, is, in the deposition of H. M. Bell, taken on cross-examination in this suit; also, if you were present when said question and answer were propounded and given?

Answer.—It is in my handwriting; the question and answer both. I was present when the question was propounded and answered.

Question 3 by same.—State what occurred between H. M. Bell and Mr. Watts, a defendant in this suit, pending the making of the answer aforesaid, and how much of said answer had been written when said occurrence took place, and how the rest of the answer made after said occurrence came to be made, and at whose suggestion?

Answer.—

Objection.—Plaintiff's counsel, J. H. Ferguson, objects to the foregoing question, as incompetent, improper, immaterial and irrelevant.

Answer.—When the question was read over to Mr. Bell, he gave the first line of the answer, as it is written, "I do not remember the circumstance." Turning to Mr. Watts, he made this remark, "But, Watts, I have no doubt it is just as you have stated." Mr. Watts suggested to Mr. Bell the additional line of the answer: "I have no recollection, either one way or the other about it." Mr. Bell then made the answer as written.

Plaintiff's counsel objects to the foregoing answer as so far as it states as to what is not down in the deposition, upon all the grounds stated in the objection to the question.

CROSS-EXAMINATION.

Question by James H. Ferguson.—Do you mean to swear to the exact words of Mr. Bell, not written down in his answer, or to your best recollection as to what the words were?

Answer.—I have given Mr. Bell's language.

Question 2, by same.—About how soon after the question and answer was written was your attention called to the language of Mr. Bell?

Answer.—I can't tell the exact number of days. I noticed the answer at the time and during the time I copied the deposition, which was as near as I can give, between the 27th of April and the first of June, 1887.

Question 3 by same.—If you noticed the answer at the time it was given, why did you not write it down as it was given?

Answer.—I regarded what was not written in the answer as a side remark to General Watts.

RE-DIRECT.

Question 1 by Watts.—Please state if you recollect who were in the room when what you have stated took place?

Answer.—Mr. H. M. Bell, General Watts and myself were the only persons in the room at the time that I remember of.

Question 2 by same.—Do you remember my calling your attention to this matter immediately after the cross-examination was closed, and Major Bell had left the room, and asking you to endeavor to remember the exact words used by Mr. Bell as stated by you?

Answer.—I do not remember that General Watts called my attention to it that night, but do remember of repeating to Mr. Watts Major Bell's language, and that Mr. Watts asked me to remember the same.

RE-CROSS EXAMINATION.

Question by James H. Ferguson.—Now please tell us when General Watts first spoke to you about it?

Answer.—It might have been the night Major Bell's deposition was closed, but of this I am not positive. It was a very short time after the deposition was closed.

Question 2 by same.—Now tell us why it is, if you remember General Watts speaking to you about this matter, you failed to say so in answer to my first question on same subject?

Answer.—Because you asked me when my attention was first called to it, and I could not fix the date positively; neither do I now fix the date positively.

And further this deponent saith not.

JOSEPH A. JONES.

LAW OFFICE OF C. C. WATTS.

By consent of all parties, C. C. Watts, a witness for defendants, appeared for further examination, and being duly sworn, answers as follows, this 27th day of October, 1887:

Present, J. H. Ferguson for E. W. Clark.
Present, W. A. Quarrier for Charles Reeder.

Question 1 by W. A. Quarrier.—State if you know who wrote the certificate, signed by Judge James H. Ferguson, concerning the validity of the Reeder title to the Dillon survey—survey filed with the papers in this cause; and if you wrote it, state the circumstances that gave rise to your writing.

Answer.—I wrote the certificate referred to, and Judge Ferguson signed it. It occurred in this way: When Mr. H. P. Camden and myself returned from Boone, Logan and Wyoming, in March, 1884, from our trip heretofore referred to in these depositions, as stated by Mr. Camden in his deposition, he and I came direct to Judge Ferguson's house before coming into Charleston, and after having made our report and exhibited the affidavits by myself which we had obtained on our trip, just before leaving Judge Ferguson's house, Judge Ferguson authorized me to telegraph H. M. Bell, in his name, that the title was all right, and that he had approved it, or would approve it. My recollection is that he said he had approved it, and said I could come back to his house the next day and he would have the certificate written. I told him that I would be over the next morning, as I wanted to get off to close up the matter with Bell as soon as possible, and at the same time offered, as I recollect, to do any writing for him in the matter which he might desire.

I went to his house the next morning after mine and Mr. Camden's departure, and found him with the title papers and affidavits above referred to, but no certificate had then

been written. I asked him for the certificate, when he, in response, asked me if I had sent his telegram, the evening before, to Bell. I told him I had done so; he thereupon stated that the reason he had asked me was, that since Mr. Camden and I had left his house the evening before, he had received a communication from Mr. E. W. Clark or H. M. Bell, I am not now sure which he said, expressing uneasiness about the title, and to the effect, that if he had not already approved it, unless he was thoroughly satisfied as to the title to reject it, but as I had already sent the telegram to Bell, that he would at once prepare the certificate; that his opinion was, that somebody had been meddling in the matter and that Clark did not want the land, but that he, Judge Ferguson, did not intend to stultify himself, or to be placed in a doubtful position, when he had already telegraphed to Bell that the title was good; he thereupon gave me pen, ink and paper and asked me to write the certificate, while he dictated the same; this I did, writing every word of said certificate under his immediate supervision and dictation, he referring as he dictated to the papers before him, relating to the matter in said certificate. After the certificate had been written, as aforesaid, Judge Ferguson signed it and delivered it to me, saying he would write to Mr. Clark or Mr. Bell, I think to Mr. Clark, the same day.

I left Judge Ferguson's house with said certificate, and as I recollect with all the rest of the papers bearing upon the title, to go, as Judge Ferguson understood, to Staunton and Baltimore and close up the sale, and left Charleston the next morning on the fast train for that purpose, and was joined by Mr. H. M. Bell, in Staunton, the evening of that day, and I think on that same evening closed the negotiations with Mr. Bell and received his *two* drafts for the hand payment as heretobefore stated in these depositions.

My recollection is that the communication Judge Ferguson spoke of having received, he said he had received

from Mr. E. W. Clark, but it is possible that he may have said from Mr. Bell.

I want to state here that I would not in this deposition have referred to that part of our conversation which relates to the communication aforesaid, and which I regarded as confidential, but for the fact that I have been charged with fraud in this land transaction, and after consultation with my counsel, as the result of such consultation and advice of said counsel, make the foregoing disclosures not in violation of confidence, but as due to myself.

Question 2 by same.—Judge Ferguson states in his deposition that you told him on your return from Wyoming, Boone and Logan, and he thinks at your first interview thereafter, of the interlock between the Dillon and the Rutter and Etting surveys. State what you told him in said interview, or in any other interview after your return from those counties and before the writing and signing of the said certificate concerning said interlock?

Answer.—Mr. H. P. Camden, in his deposition, states that he was present at our first interview, after our return from Boone, Logan and Wyoming, and in substance states that at that interview the Rutter and Etting and Dillon interlock was not referred to, his statement is true, and I will also say myself that no such information was given by me in that interview, nor was the subject of any interlock discussed in that conversation. The only other interview I had with Judge Ferguson, after my return from Boone, Logan and Wyoming, and before my departure to Staunton and Baltimore, as aforesaid, was the conversation which took place at his house the next morning after Mr. Camden and I had been together at his house and left the evening before. In other words, I had only two conversations with Judge Ferguson after my return from Boone, Logan and Wyoming, and before my departure for Baltimore.

One of those conversations occurred in Mr. Camden's presence and the other at the time of the writing and

signing of the certificate aforesaid, and in neither of those conversations was such information given as claimed by Judge Ferguson.

I have stated in substance all that was said in the conversation which took place at the time the certificate was written. I will here state that Mr. Camden returned from Boone, Logan and Wyoming one afternoon, and as I now recollect, and feel quite sure, I left on the early train the second morning thereafter for Staunton and Baltimore with the certificate of Judge Ferguson, and all the papers in relation to the title, in my possession.

Question 3 by same.—What do you know about a suit, and its disposition, pending in 1883, between Chas. Reeder and Ivison D. Bailey, in the Circuit Court of Wyoming County? Before what judge the said case was tried and what information did you give Judge Ferguson, Maj. H. M. Bell and R. H. Catlett concerning it, and when; also, state what you said about other suits then pending or proposed to be brought?

OBJECTION.

The Plaintiff's counsel objects to this question, so far as it may call for matters appearing if record in the Court in which said suit was, unless such records are produced; but so far as it relates with conversations with Watts in reference to any suit it is not objectionable.

Answer.—In 1883, I, on behalf of Mr. Reeder, appeared with James H. M'Ginnis, of Raleigh, in a suit against Ivison L. Bailey in ejectment in the Circuit Court of Wyoming County. I think Lawden Bailey, a brother of Ivison Bailey, was also a defendant, but of this I am not positive. Ivison Bailey claimed under a lease through William Workman as the agent of a Mr. Merritt, whose given name I don't recollect if I then heard, the owner or claimant of a portion of the Rutter and Etting survey inside of Mr. Reeder's line. Mr. John W. M'Creary, of Raleigh, was Bailey's attorney in

said suit, Judge David E. Johnston, the present judge of that court, was then judge, and presided as such at the trial.

At the time of making and executing the contract aforesaid I mentioned these facts in our discussions of the Reeder title to the Dillon survey, and the worthlessness of the Rutter and Etting title, in my opinion, so far as it conflicted with the Dillon. My statement so made was either to Judge Ferguson or to Major Bell in a conversation with them both in the presence of R. H. Catlett. I told them in the same connection that William Workman was trying, or had been trying, to build up title against Mr. Reeder, as the agent of Mr. Merritt, to that portion of his lands purchased of the Rutter and Etting survey, and mentioned the Bailey case as one of the instances in which had failed before Judge David E. Johnston, who was one of the parties to this transaction, and who, in fact, had brought about the negotiations which resulted in a sale. I may here say that Mr. Bailey abandoned his defense when the case came on for trial, and allowed judgment to go. This fact was made known to the same parties at the same time and place.

I also stated at the same time and place, and to the same parties, that Mr. Reeder was then contemplating instituting suit against one B. F. Perry, in Boone County, to eject him from said land, but had not at that time done so; B. F. Perry being another party holding against Mr. Reeder on that part of the land understood to be inside that part of the land in the Rutter and Etting survey.

Question 4 by same.—What do you know, if anything, about the ownership of a part of the Rutter and Etting survey by Dr. P. H. McCulloch, and one J. A. Holly, in the County of Boone, and if so how and when did you get your information?

OBJECTION.

Plaintiff's counsel objects to this question so far as it seeks to prove by parole the title to real estate by the parties or either of them named in the question.

Answer.—At the time of making and execution of the contract of sale, which was, I believe, on the 29th of February, 1884, while speaking as I have said in my former deposition in this cause, of the interference of the Rutter and Etting survey with the Dillon, I mentioned that I had understood that the Rutter and Etting survey had long since been forfeited and sold as such by General Alfred Beckley, as Commissioner of School Lands for Raleigh County, when Judge Ferguson corrected me, stating that General Beckley had sold it as Commissioner of School Lands for Fayette and not Raleigh. I also stated in the same connection that I had understood that General Beckley, as such Commissioner, had reported that the Dillon survey had never been forfeited. In this same conversation, in speaking of where the probable interference was, I think I stated that I thought that Mrs. Neal and some of the Perrys lived in that section of country in Boone County embraced in the interlock, but that I did not think the Reeder land ran far into Boone, and Judge Ferguson said that it could not run very far, as a Mr. Holly, of Lincoln, and Dr. P. H. M'Culloch, of Cabell, had purchased a part of the Rutter and Etting survey and had never heard of any such interference; that Thomas H. Harvey, of Cabell County, the son-in-law of Dr. M'Culloch, had either spoken to him about the lands or asked him to look after the lands in Boone County, I am not sure now which, and I understood him also to state that he was then the counsel of the Holly heir. Judge Ferguson, in his deposition given some time ago in this case, does not remember this conversation as I have stated it, but I feel assured that I am not mistaken for the reason that I never knew until that time that Mr. Harvey was a son-in law of Dr. P. H. M'Culloch, which turns out to be the fact, as shown in Judge Ferguson's deposition.

Question 5 by same.—State, if you know, why Judge Ferguson did not go in person to Wyoming, Boone and Logan to examine the Reeder title to the Dillon survey.

Answer.—This involves another statement which I considered confidential, and which I do not like to make, and would not but for the charge of fraud that has been broadly made again in this case. Before Mr. Camden and I started to Boone, Logan and Wyoming, and after Bell and Catlett had left here, Judge Ferguson told me that, under his employment, he would be expected to go in person to the counties above named to investigate the Reeder title before making his certificate, but that Harry, referring to his law partner, H. P. Camden, could get all the facts he wanted just as well as himself, and that he would send him with me, as it was a long trip; that the waters were high and the weather was very bad, and that he was not going to make the trip himself, though they, Clark or Bell, or both, I don't know to whom he referred specifically, would not like it if they knew he did not go in person, when he knew Harry and I could attend to everything on the trip and get all the information he wanted, just as well as if he went himself with me. At the time Mr. Camden received from Judge Ferguson instructions in my office what he was to do on the trip. Judge Ferguson had Mr. Camden to write for certain information to John Beckley, clerk of the courts of Raleigh county, respecting this land. The letter was sent, and Mr. Beckley answered for me, giving the desired information, and I furnished the same to Judge Ferguson.

I may here say that I was very solicitous to complete the sale and I asked Judge Ferguson not to turn my title down hastily, because of the imperfection in the tax deed; that I was satisfied I could furnish him with all the evidence of possession that he desired; that my interest in the sale was a very important matter to me and I desired my title approved, if he found upon full examination he could consistently do it. This I believe he did, consistently and conscientiously and with a desire to help me, so far as it did not affect the rights of his own clients.

Question 6 by same.—How did you come to go with Judge Ferguson to Baltimore to see Mr. Reeder?

Answer.—Soon after Mr. M. A. Miller made his report to Judge Ferguson, of his surveying done on the Dillon lands and Rutter and Etting lands, I was informed that there was a large interlock between the two surveys, and Judge Ferguson in talking to me about it, spoke of the importance of our seeing Mr. Reeder together, and getting authority to bring suit to clear up the title, and Judge Ferguson remarked that Mr. Reeder, he thought, would not hesitate to have such suit brought, that Mr. Reeder would be as much surprised as we were at the extent of the interlock, for instead of there being only 5,000 or 6,000 acres in the interlock, it turned out by Miller's report that all but 5,000 or 6,000 acres of the Reeder tract was covered by the interlock. We soon afterwards went to Baltimore, sometime in January following, if I mistake not, though I don't remember the date with any accuracy and in this connection I will say I am not sure as to the exact date of my leaving here for Baltimore, at the time I went with Judge Ferguson's certificate of title. I know that I was in a hurry to get the certificate and to close up the trade and my impression is, and was, that I left the next morning after getting such certificate, though I have an indistinct impression about some delay in getting off, either through telegraphing to Maj. Bell to have him meet me at the train on my way, or for some matter detaining me here.

OBJECTION.

Counsel for Plaintiff objects to the last question and answer, so far as the answer is responsive to the question, because it is immaterial and irrelevant to any issue in the cause; and so far as it is not responsive to the question he objects to the same for that reason.

Question 7 by same.—Who brought about the negotiations between you, Bell and Catlett for the sale of the Reeder land. When and how?

OBJECTION.

Counsel for Plaintiff objects, because it is immaterial, improper and irrelevant to any issue in this cause.

Answer.—Judge David E. Johnston, of Princeton, W. Va., who, as shown by Major Bell's deposition, is one of the purchasers. In January, I think, in 1884, by calling me by correspondence to Philadelphia, to the Girard House, where he brought Major Bell, Capt. Catlett and myself together.

Question 8 by same.—What did Judge D. E. Johnston know about the Dillon and Rutter and Etting surveys, and what opportunity did he have for such knowledge?

OBJECTION.

Plaintiff's counsel objects to this question because it is irrelevant and immaterial to any issue in this case.

Answer.—I cannot state the extent of his knowledge of said surveys, but I do know that some years ago, while I lived in Wyoming County, Judge Johnston and I for a portion of that time were law partners, and frequently talked about the Dillon survey and the advisability of instituting suit for Mr. Reeder to clear up his title. I do not know that Judge Johnston knew much, if anything, at that time about any interlock between the two surveys, as I myself knew but little, and attached less importance to it; my impression, however, is that Judge Johnston and I talked in a general way about such interlock, though of that I am not sure.

At the time of the Bailey trial above referred to as having taken place in 1883, Judge Johnston knew of Bailey's defense, and of his claiming to hold against Reeder under the Rutter and Etting survey. Though what impression that knowledge made upon him I do not know. I came with Judge Johnston from that term of the court, by way of Logan Court-House, to his place of holding court in Boone. I think, though I am not sure, this was in the fall of the

year. On our way from Wyoming to Logan Judge Johnston and I talked about the Reeder land and its title, and the annurement of the Rutter and Etting forfeiture to the benfit of the Reeder title, and in that connection inquired of Judge Johnston his opinion as to the legal effect of the failure to have certain statutory provisions complied with in the recordation of the tax deed to Ward and Lawson, and mentioned to Judge Johnston that I had an option from Mr. Reeder for the sale of the land, and that if I could establish the title and he could organize a syndicate to take the land, he and I together might make some money out of it.

He, without saying anything about joining me, said he thought he could find purchasers for the land; he expressed himself in doubt about the question I had propounded to him, and when we got to Logan Court-house he proposed that we would consult Judge Ferguson, who was then attending court upon that point. This we did, and Judge Ferguson decided against us on the point. I afterwards got a certificate from the Clerk's Office, as I recollect, of Wyoming County, making that point clear, which the record had failed to disclose, and which certificate was satisfactory to Judge Johnston, and he called attention to the fact in our conference at Philadelphia with Bell and Catlett. Judge Johnston afterwards, or, perhaps, before that time, had the question of Reeder's title before him as judge in a chancery suit in Raleigh county, to restrain sundry parties from removing timber from Mr. Reeder's land, but whether that suit involved the question of interlock between these two surveys or not, I cannot state.

OBJECTION.

Plaintiff's counsel objects to the last answer upon the same grounds stated in his objections to the question, and further, upon the grounds that the sayings and doings of

Judge Johnston are not competent, proper or pertinent evidence in this cause, he not being a party to this suit.

Question 9 by same.—Have you seen Mr. H. M. Bell's deposition, in which he says he loaned you the money to go to Baltimore when you and he went there to see Reeder, and that you paid him back? If so, what have you to say in regard to that transaction?

Answer.—I have simply this to say: that I never borrowed then or at any other time from Mr. H. M. Bell $40.00, or any other amount of money, and never paid him back $40.00, or any other amount of money.

As I stated in my deposition first given in this case, Major Bell furnished me $40.00 as payment of my expenses to Baltimore, and took from me a receipt therefor, as agent of E. W. Clark, and if he will produce the receipt, or have Mr. Clark do so, he will find it as I have stated it. When the question of my going to Baltimore came up, I stated that I did not believe Mr. Reeder would approve the contract as written, and that I was unwilling to incur any expense in going there; that I had made one trip to Philadelphia for the purpose of affecting a sale to his parties, without success, at my own expense, and that I would not incur any further expense. Mr. Bell finally agreed that he would pay my expenses, and asked me what amount would be necessary. I told him $50.00. He objected to that amount, stating that he could go there and back for $40.00. I stated to him that if $40.00 would pay the expenses, that was all that I wanted. He then paid me the $40.00, and in writing my receipt therefor I was surprised to find that he took it as the agent of E. W. Clark, when I had supposed from what he said that he was paying it himself. Mr. Bell says, also, in his deposition that I agreed or proposed to treat the $40.00, which he claims to have advanced me as a loan, as a part payment on the land, if the sale was consummated.

In answer to this, the two drafts which Mr. Bell paid to me, were for $25,000.00 and $10,000.00, respectively, without any deductions for $40.00 or any other part payment, and the $10,000.00 draft was, by Mr. Bell's instrumentality and in his presence, placed to my credit by William Eskridge, now dead (I think his name was William) in the National Valley Bank of Staunton, Virginia, within an hour after he had given the said drafts for the full amount thereof, and the $25,000 draft was turned over in full by me to Mr. Charles Reeder.

Question 10 by same.—What statement, if any, did you make Judge Ferguson, at the time of the making and execution of the contract sale, claiming or representing to have the right as agent of Mr. Reeder to sell the land as such agent?

Answer.—I made no statement to Judge Ferguson at that time, which was not made in the immediate presence of Mr. H. M. Bell and Mr. R. H. Catlett. I made no statement of agency to Judge Ferguson or any one else. I had no power or authority, either verbal or in writing for the sale of said land as agent. I had simply two paper writings which I denominated as options, which did not in any way raise an agency and Mr. Bell's deposition taken on cross-examination, shows conclusively that I did not make any representations of agency or any other representations at variance with two said papers writings, which he himself states he had read at the time of giving his deposition.

Question 11 by same.—What, if anything did you say at the time of the execution of said contract of sale to the parties then present with reference to the claims of Theron or Jacob Merritt to a part of the Rutter and Etting survey and its interference with the Dillon survey?

Answer.—I stated that Wm. Workman, of Boone County, was then and had been previously trying to build up an adverse title against Mr. Reeder as the agent of a Mr. Merritt. I don't know that I mentioned what Merritt, who,

I understood, claimed under the Rutter and Etting survey, by leasing to certain parties a portion of the land in the Reeder survey; and I think, but I am not sure of this, that I mentioned a Mr. Peters as one of such lessees; this, however, is merely an impression, and I may be mistaken about it as to the man Peters.

CROSS EXAMINATION BY PLAINTIFF'S ATTORNEY.

Question 1.—When you and Mr. Camden returned from your trip to Boone and the other counties, and at which time I informed you that I was satisfied with the title, you told me, did you not, that you wanted my certificate as quickly as possible, so that you could go with it at once to Staunton and close up the matter with Mr. Bell?

Answer.—I think it likely that I did, as such was the case.

Question 2.—You came to my house next morning, did you not, at which time the certificate was written, and was it not written and completed as rapidly as it could be, and did you not leave there as soon as you received it?

Answer.—As I recollect I went there, as asked in the question, and the certificate was written without any unnecessary delay under your dictation, as already stated by me, and soon thereafter I left, as asked in the question.

Question 3.—You speak in your answer to the third question in your deposition about an action of ejection in Wyoming County, now state whether any surveying was done in that action and if so, what, and whether there was any trial of it it before the Court or jury?

Answer.—No surveying was done that I know of and whether there was a trial before a jury I am not sure.

My impression, however, is that a jury was impanneled and the plaintiff's case proven before and the verdict rendered by the jury; but of this, as I say, I am not sure.

What I do recollect is this, Mr. McGinnis and I pressed the case for the plaintiff from the beginning of the term.

Mr. McCreary sought a delay for Mr. Bailey, until late in the term, to enable Wm. Workman to attend from Boone County, Mrr Bailey desiring to see Mr. Workman before deciding whether to make the fight on his lease or not. As I recollect, Mr. Workman came during the term and urged Mr. Workman to make the fight; at least that was my understanding from Mr. McCreary and Mr. Bailey.

Mr. Bailey finally, however, decided not to do so, and so informed me. This was stated in open court, and we took for the plaintiff, under the supervision of the Court, a verdict for the plaintiff for the land set out in the declaration and judgment thereon.

NOTE.

Plaintiff's counsel objects to all of the foregoing answer, after the words "I am not sure," as not responsive to the question, and is not competent or proper evidence in the cause.

Question 4 by same.—You speak in the answer to the 8th Question in your foregoing deposition of a suit in chancery in Raleigh County involving Mr. Reeder's title to the Dillon survey. Now state whether upon reflection you do or do not know that the Rutter and Etting survey was not involved in that suit, but that the controversy grew out of an alleged prior purchase of the Dillon survey by the persons claiming the Dillon survey against Mr. Reeder?

Answer.—I have no information of any such prior purchase as indicated in the question, and when I stated that I stated that I could not state whether the interlock was involved in that suit, it was because I was in doubt whether the parties seeking to remove the timber claimed under the Rutter and Etting survey or under the "Granger" title, and how far, if under the Granger title, that involves the Rutter and Etting, if at all, I cannot state, as I am not familiar with the Granger title.

Question 5.—Do you mean by your last answer to say that you have no knowledge of any person claiming the Dillon lands against Mr. Reeder under an alleged prior purchase at ony time or in any way?

Answer.—I don't know that I understand just what is meant in the last question. If purchasers to portions of the land under junior patents is meant, of course I knew of those that have been heretofore spoken of; if Dr. C. C. Cox, who was a purchaser under the Ward & Lawson title and who sold to Reeder is alluded to, of course I know of that transaction; but I have never heard of any collateral title to the Reeder title to the Dillon survey, other than the C. C. Cox transaction, if that can be called collateral.

I have heard that General Beckley, in selling the Rutter and Etting land as forfeited, sold some portions on the Dillon survey, but just how or when I heard that I don't know; and whether the Granger land is a part of such parcels I cannot state.

Question 6.—You speak in your deposition of a trip to Philadelphia and of an interview with certain persons there in reference to the Dillon survey. Please state who were present at that interview and where it took place.

Answer.—Maj. H. M. Bell, Capt. R. H. Catlett and Judge David E. Johnston, and a part, if not all the time, Charles Straley, of Princeton, W. Va. It took place in the room of Bell and Catlett, at the Girard House, Judge Johnston inviting me into their room for such interview.

There may have been some talk outside of that room between the same parties, but the principal interview was there. Judge Johnston and I had several interviews at length before that one, however, during that day.

Question 7.—Did you have with you the title papers of Mr. Reeder to the Dillon survey at that interview, and was his title to that survey discussed then? And if so, did you ay anything about the Rutter and Etting survey?

Answer.—I do not and cannot remember just now whether I had the Reeder title papers with me or not at that time; the probability is that I had them. I had a letter from Judge Johnston to the effect that he was going East, and when I left home I started to Washington on business and land matters. There I received, through Senator J. E. Kenna, two telegrams from Judge Johnston, then in Philadelphia, calling me there.

I do not think the Dillon title was discussed, except in a general way, except that Judge Johnston remarked that he thought the Dillon title was all right; that there had been a defect in it, but that he understood that that had been removed. I do not recollect any reference being had in that interview to the Rutter and Etting survey, though Judge Johnston and I may have talked about it in his room in our talk about the Dillon survey, and my option on it.

Question 8 by same.—Before what Judge was the suit in Raleigh County, between Mr. Reeder and C. C. Cox and others, referred to in the certificate of title made by J. H. Ferguson, tried and determined?

Answer.—It was tried before the Hon. Evermont Ward, then Judge of that circuit.

And further this deponent sayeth not.

C. C. WATTS.

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, ss.

I, E. B. DYER, a Notary Public in and for said county, in said State, do certify that the foregoing depositions of H. P. Camden, Joseph A. Jones and C. C. Watts, were taken, sworn to and subscribed before me at the time and places named in the captions to the several deponents by consent of all parties. And I further certify that I have no interest as counsel or attorney for any party interested herein.

Given under my hand this 25th day of November, 1887.

E. B. DYER, *Notary Public.*

A copy,

Teste:

JASPER Y. MOORE, *Clerk,*

D. C. U. S. D. W. Va.

Office Supreme Court, U. S.
FILED.
MAR 1 1895
JAMES H. McKENNEY,
CLERK.

No. 262. October Term, 1894.

IN THE

Supreme Court of the United States,

E. W. Clark, Appellant,

vs.

Charles Reeder, Appellee.

Appeal from the Circuit Court of the United States for the District of West Virginia.

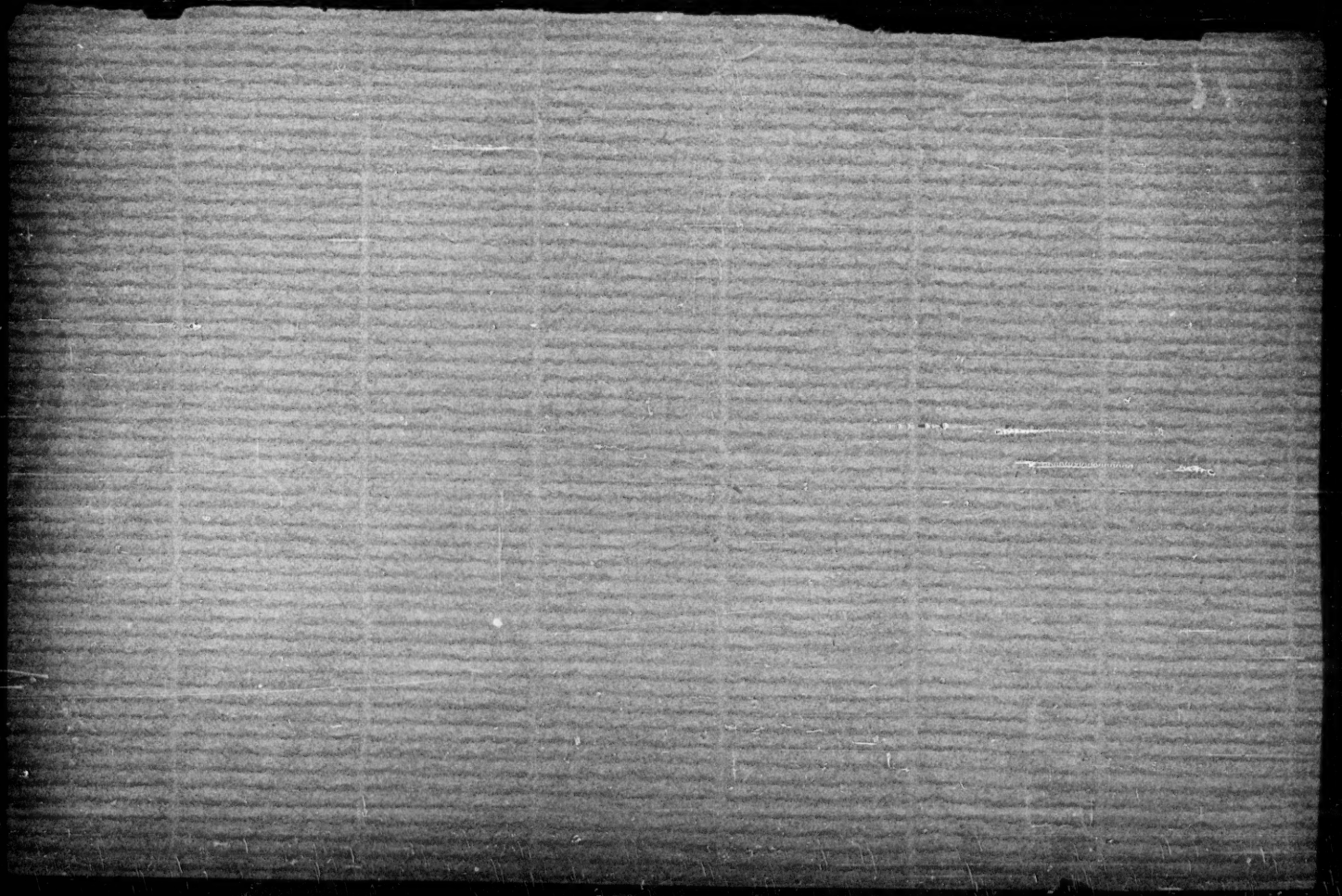
PAPER-BOOK FOR E. W. CLARK, APPELLANT.

INDEX.

	PAGE
Statement of Case,	1
Assignments of Error,	5
Brief of Argument,	8
Answers and Testimony of C. C. Watts,	12
Facts known to and concealed by Reeder and Watts,	18
Fraudulent Acts and Misrepresentations,	21
Cases and Authorities,	23
Facts proven fulfill all the conditions which equity requires in order to entitle the plaintiff to relief,	35
Opinion of Circuit Court,	43
Effect of Reeder's agreement to convey with special warranty only,	46
Ferguson's Certificate,	47
Agency of Watts,	49
Reeder's cross-bill for specific performance,	50
Rescission is the proper remedy,	53

JOSEPH S. CLARK,
RICHARD C. DALE,
Of Counsel for Appellant.

FRANKLIN PRINTING CO., 518-18 MINOR ST., PHILADELPHIA.



IN THE

Supreme Court of the United States.

OF OCTOBER SESSIONS, 1894.

E. W. CLARK, Appellant,
vs.
CHARLES REEDER, Appellee. } No. 262.

Appeal from the Circuit Court of the United States for the District of West Virginia.

PAPER-BOOK FOR E. W. CLARK, Appellant.

STATEMENT OF THE CASE.

The original bill was filed to secure a rescission of an executory contract for the sale of a tract of land. The defendant filed a cross-bill asking specific performance of the contract.

The defendant, Reeder, by writing dated February 29th, 1884, contracted to sell to the plaintiff, Clark, a certain tract of land in West Virginia, containing 50,096 acres more or less, known as the Dillon Tract. It was to be a sale by the acre, and not in gross, and the price to be paid was $1.70 per acre, of which $35,000 was to be paid when James H. Ferguson, an attorney of Charleston, West Virginia, certified that Reeder's title was good and valid, which certificate was to be given within

thirty days, and the balance on June 1st, 1884, or as soon thereafter as the necessary surveying could be done to determine how many acres Reeder could make good title to. The written agreement contained this further provision :

"It is understood that the party of the scond part [Clark] is satisfied with the survey already made by William T. Sarver of the exterior bounds of said tract of land, and that the surveying to be done is only such as may become necessary to ascertain what lands within the said boundary are held by a better title than that of the said Reeder by reason of adverse title and possession."

When the acreage to which Reeder could make good title was determined, the balance of the purchase-money could be calculated. The written agreement was signed by C. C. Watts, as the agent for Reeder, and was made subject to Reeder's approval, and by H. M. Bell, as the agent for Clark. It will be found at page 5 of the Record. The negotiations were had at Charleston, West Virginia, and the paper was written by James H. Ferguson, and signed by Watts and Bell after the business had been fully discussed. After the writing had been signed, Watts and Bell took it to Reeder, in Baltimore, and had a full discussion of it with him on March 3d, 1884. Reeder gave his approval on March 4th, 1884.

Reeder's title was known to be a tax title, and it was so stated in the contract, and Ferguson, as soon as he looked over the papers, gave it as his opinion that the tax proceedings were irregular and the title bad unless there had been sufficient possession under the tax deed which could operate as color of title to mature and ripen a title under the statute of limitations. Before giving his certificate in regard to the title, he asked for some evidence of possession on the part of Reeder, which Watts undertook to secure. For this purpose Watts and Camden, who was Ferguson's partner, went upon the property and secured affidavits showing possession of the tract by Reeder's tenants for more than ten years, the length of the West Virginia statute of limitations. With this information, Ferguson, on March 22d, 1884, gave his certificate that Reeder's title was, in his opinion, good and valid except as to the parts affected by

the claims of actual occupants, which might or might not be good, and that the extent of these claims must be small comparatively. In his certificate he stated the following:

"The only title which can be found older than the Dillon patent is a grant from the Commonwealth of Virginia to Rutter and Etting, dated the 9th day of January, 1796. There is, from the best information I can obtain, a small portion of the Rutter and Etting survey embraced within the Dillon survey, but the Rutter and Etting survey was forfeited long prior to 1837 in the State of Virginia for the non-payment of taxes thereon and for the non-entry thereof on the land books of the proper counties, and was sold by the Commissioner of Delinquent and Forfeited Lands some forty or more years ago. At the time of that sale the taxes on the Dillon survey had always been paid, and for that reason the title to the whole thereof became good and valid so far as the Rutter and Etting survey is concerned."

Ferguson's "best information" in regard to the extent of the interlock was obtained from Watts. His opinion that the forfeiture enured to the benefit of the Dillon title was erroneous, as will appear by reference to page 36 of this paper-book. Watts took Ferguson's certificate to Bell, at Staunton, Virginia, and on March 25th, 1884, Bell gave Watts two drafts on Clark, one for $25,000 and one for $10,000, making together the $35,000 cash payment, the $10,000 representing Watts' commission.

Clark sent his surveyor, M. A. Miller, on the ground to do the surveying called for by the contract. The surveyor discovered that instead of a small portion of the Rutter and Etting being embraced within the Dillon, as certified by Ferguson, the Rutter and Etting covered the entire 50,096 acres of the Dillon, except some 5,000 or 6,000 acres; that the Rutter and Etting had been sold by the Commissioner of Forfeited and Delinquent Lands in 1840, and was claimed by a large number of persons who assert that their title is superior to Reeder's title. With this information, Clark refused to go on with the contract, but made various propositions of settlement. He offered, at his own cost, to commence and prosecute actions of ejectment against these Rutter and Etting claimants, and pay for what land he recovered, if Reeder would give the use of his name, for the legal title was vested in him. But this Reeder refused, and he also refused to commence

and prosecute any such suits himself, and insisted on settlement by Clark under the terms of the contract for the entire boundary, excepting so much thereof as could be held against him by the small settlers by reason of adverse title and possession, claiming that Clark should take the risk of the Rutter and Etting claims. When it became evident to Clark that he could make no adjustment with Reeder, he filed his bill in the Circuit Court of Boone County, West Virginia, at the August Rules, 1885, setting forth the facts as outlined above and asking for a rescission of the contract and repayment of the $35,000 and interest, on the ground of mutual mistake as to the existence and extent of the conflict between the Dillon and the Rutter and Etting surveys. The case was removed by the defendant to the Circuit Court of the United States for the District of West Virginia, sitting at Charleston, and the defendant filed his answer therein, in which he sets out the contract and denies that the Rutter and Etting title has any validity or is any excuse for Clark's refusal to carry out his contract or any ground for rescission. He also denies that there was any mutual mistake. On May 5th, 1886, Reeder filed his cross-bill, asking specific performance of the contract. On the same day, on Clark's motion, a receiver was appointed to protect the property and to prosecute suits for the possession of the property against the adverse claimants, and he did institute a lot of ejectment suits. After this Clark discovered that both Reeder and Watts knew as early as 1873 that the Rutter and Etting survey covered almost all of the Dillon survey, and that they had learned this fact as the result of an actual survey made by W. T. Sarver for Reeder, and had made a map and sketch of the two tracts showing the interlock. Upon receiving this information Clark filed an amended bill (November 26th, 1887), charging Reeder and Watts with fraudulent misrepresentations in regard to Reeder's title, and the existence and extent of the interlock between the Rutter and Etting survey and the Dillon survey, and concealment of material facts which were well known to them, and asked for rescission of the contract on the ground of fraud.

The opinion in the Circuit Court was delivered by Mr. Justice

Harlan. He held that the evidence of fraud was not sufficient to justify a decree rescinding the contract, and that the existence of the large interlock with the older Rutter and Etting patent was not of itself sufficient to justify such a decree, for notwithstanding the fact that the Rutter and Etting was the older, the Dillon might be the better title. He denied Clark's prayer for rescission of the contract and granted Reeder's prayer in his cross-bill for specific performance. This decree was entered on December 4th, 1889.

The case was referred to a master to report "all the tracts of land, if any there are, within the exterior boundaries of the Dillon survey as run by Sarver, which are shown to be in the possession of persons whose right thereto is better by reason of adverse title and possession than the title of Reeder." The master reported under this reference, and on May 30th, 1891, the Circuit Court gave judgment against Clark for $70,064.96, being $1.70 per acre for 47,572.75 acres, with interest, taxes, etc., less the $35,000 cash payment, and ordered the actions of ejectment which had been instituted by the receiver to be dismissed and discharged the receiver.

ASSIGNMENTS OF ERROR.

"Your petitioner, the above-named plaintiff, E. W. Clark, prays an appeal to operate as a *supersedeas* from the following decrees entered in these causes, viz.:

"1. The decree entered in said causes on the 4th day of December, 1889, and

"2. The decree entered therein on the 30th day of May, 1891.

"And your petitioner assigns the following errors in said first-named decree, entered December 4th, 1889:

"1. The Court erred in referring the question of title to the lands in question in this suit and mentioned in said decree to the commissioner therein named, to be decided and reported on by him, inasmuch as the persons claiming title to said lands

adverse to said Reeder were not parties to these causes, and even if said commissioner could properly decide upon the questions of title in this cause they were not bound by his decision even when confirmed by the Court.

"And your petitioner assigns the following errors in said second-named decree entered on this 30th day of May, 1891, to wit:

"1. The Court erred in not sustaining the exceptions of your petitioner to the report of Commissioner Ruffner made in this cause.

"2. The Court erred in holding and decreeing that the defendant Reeder was entitled to be paid for 47,572.75 acres of the land in question in these causes at $1.70 per acre, whereas the Court should have held and decreed that even if said Reeder was entitled to the enforcement of the contract in question in these causes it should not have been enforced for more than 7,000 acres of said land, that part of the Dillon survey not covered by the Rutter and Etting survey.

"3. The Court erred in holding and decreeing that there was due and payable from your petitioner to the said Reeder the sum of $65,645.22, the price of 47,572.75 acres of land at the price per acre aforesaid, when there was not due to said Reeder under any circumstances in these causes more than the amount due him for the said 7,000 acres at $1.70 per acre, if he was entitled to anything under the said contract and the evidence in this cause.

"4. The Court erred in decreeing the payment by your petitioner to the said Reeder of the sum of $1,000, with its interest, as stated in said decree.

"5. The Court erred in holding and decreeing that your petitioner should pay to said Reeder the sum of $2,988.74 for taxes paid on the land in question by him and interest thereon, as your petitioner was not in the possession of the said land, and was not, therefore, assessed with said taxes, and was not, under the laws of the State of West Virginia, liable for said taxes.

"6. The Court erred in holding and decreeing that there was

due and owing by your petitioner to said Reeder, under the contract in question in this suit and for said taxes and interest and said $1,000 and interest, the sum of $70,064.96, which sum said decree declared to be a lien on said lands in question.

"7. The Court erred in holding and decreeing that your petitioner should not have the relief prayed for in his original bill and the amended and supplemental bill in these causes, and thereby dismissing your petitioner's said bills.

"8. The Court erred in holding and decreeing that the said Reeder was entitled to the relief prayed for in his cross-bill filed in these causes, and that the said contract of February 29th, 1884, be specifically performed.

"9. The Court erred in not holding and decreeing that your petitioner was entitled to the relief prayed for in his said bills and in not holding and decreeing that the said contract of February, 29th, 1884, was procured by the said Reeder by false and fraudulent representations and concealments, and was, therefore, fraudulent and void and of no effect, and in not setting the same aside as so fraudulent and void.

"10. The Court erred in holding and decreeing that your petitioner should pay to said Reeder the sum of $70,064, with interest, and the costs of this suit, and that, upon his failure to pay the same, the lands in question should be sold to pay the same, as therein specified.

"11. The Court erred in not dismissing the said cross-bill of the said Reeder instead of granting the relief therein prayed for.

"12. The Court erred in discharging the receiver heretofore appointed in these causes, and

"13. The Court erred in dismissing the actions of ejectment brought under the decree of this Court against the persons in possession of parts of the land in question in these causes holding adverse to said Reeder.

"And for these and divers other errors apparent upon the face of the record in these causes your petitioner prays the said decrees and each of them be reversed, and he will ever pray, etc."

BRIEF OF ARGUMENT.

The grounds upon which Clark seeks to secure a rescission of this contract are, that at the time Reeder contracted to sell this Dillon tract of land to him, both Reeder and his agent, Watts, knew that there was an older patent, the Rutter and Etting, which covered almost all of the Dillon. The property had been surveyed for Reeder and a sketch or map had been prepared showing that at least three-fourths of the Dillon was included in the interlock (Record, page 435, and exhibits "C. R., Nos. 2 and 3," pages 442–44), and yet with this information Watts fraudulently represented that there was no older title than the Dillon; that the interlock between the Dillon and the Rutter and Etting was small and inconsiderable; that he did not know and had no means of knowing its extent, and had no accurate information on the subject; that he wanted Bell and Ferguson to know all that he knew about the land and wanted to conceal nothing from them; that he showed them all the papers he had relating to the property and gave them all his information, and yet all the time he fraudulently concealed his information in regard to the extent of the interlock. Ferguson relied upon these fraudulent misrepresentations and incorporated in his certificate a statement that a small portion of the Rutter and Etting was embraced within the Dillon, Watts actually writing the certificate with his own hand in order to assist Ferguson in the preparation of the paper, knowing all the time that this statement was untrue, and fraudulently concealing the information he had on the subject as the result of Sarver's survey and the sketch. The extent of the interlock was not known to Ferguson or Clark or Bell until some time afterward, when Surveyor Miller went upon the property to do the surveying called for by the contract, and discovered and reported that the Rutter and Etting covered all of the Dillon but a few thousand acres.

Clark thought this was as much of a surprise to Reeder as it was to him, but as a matter of fact it was of course no surprise to Reeder at all, for he knew it all the time from Sarver's survey and the sketch. Reeder had made no mention of this in-

terlock or its extent to Bell when Bell and Watts discussed with him the contract and Reeder's title in Baltimore, on March 3d, 1884, before Reeder gave his approval, and when Bell "told Mr. Reeder that he did not want to pay for land which he might not get" (Record, page 419). In fact, at this interview both Reeder and Watts fraudulently concealed their information on these points, and later, after Surveyor Miller had discovered and reported the facts, Reeder continued to play his part, and even in April, 1885, when Reeder's attorney, McColgan, and Reeder's son, Oliver Reeder, came to Philadelphia to demand a settlement from Clark, Reeder, the defendant, gave his son a memorandum of facts, in which he states, "Gen'l Beckley's plat shows the Rutter and Etting tract, as located and sold by him, does not to any appreciable extent interlock Dillon." This memorandum is Exhibit "McC." filed with Clark's answer to Reeder's cross-bill, and appears on page 70 of the Record. It was shown to Clark by Oliver Reeder and left with him. It was not until April 11th, 1887, that the plaintiff, Clark, first learned, through the cross-examination of Reeder (Record, page 435), that he, Reeder, and also Watts, had accurate information as early as 1873 that the Rutter and Etting covered almost all of the Dillon. The amendment to the second amended and supplemental bill, in which the charge of fraud is contained, was filed after this (Record, p. 87).

Reeder and Watts have endeavored to charge Clark with knowledge of the interlock with the Rutter and Etting before the contract was executed, and Watts, in the answers he has filed, and in his testimony, swears that he gave Bell all the information he had on the subject of the Rutter and Etting interlock, and gave his best impressions of its extent, estimating it at from 5,000 to 6,000 acres. Of course the purpose of this was to establish notice to Clark of the existence of the interlock, and to charge him with negligence in not determining its extent before completing the contract, and to show that he took the risk and was satisfied to do so, because he thought the interlock was small and was willing to rely upon Ferguson's opinion as expressed in his certificate that the Rutter and Etting

was long ago forfeited, and on this account the Dillon was good and valid as to it. If this was all there was in the case, and Watts had sworn to the whole truth, Clark would still be entitled to a rescission on the ground of mutual mistake as to a material fact, to wit, the extent of the interlock. In Watts's testimony and pleadings, he makes a great show of fairness, but never mentions at all that he knew all the time he was negotiating this contract that the Rutter and Etting covered almost all of the Dillon. He filed his first answer on December 4th, 1886 (Record, page 71), and his second on March 19th, 1887 (Record, page 92), and on the same day, March 19th, 1887, he gave his testimony. It will be noticed that up to this time Clark had not discovered that Reeder and Watts had known since 1873 the full extent of the interlock. They kept this a secret until it was brought out by the cross-examination of Reeder on April 11th, 1887 (Record, page 435). When this fact was developed, as the result of this cross-examination, it gave the previous testimony and pleadings of Watts a very different aspect, for every representation which Watts testifies he made to Bell and Ferguson in regard to the interlock appears in the light of Reeder's cross-examination as a fraudulent misrepresentation, because it is shown he said what he knew was untrue and told only half the truth, just enough to deceive and mislead. He makes out a stronger case against himself and Reeder than the plaintiff's own witnesses do. This result is due to the discovery of this information in regard to the extent of the interlock known to and concealed by Reeder and Watts during all the negotiations which resulted in the contract and the payment of the $35,000, and only developed when Reeder was cross-examined after all the important testimony in the case had been taken.

In this view of the case it is not worth while to make more than a brief reference to the testimony of Bell and Ferguson. They both swear that Watts represented to them that the Dillon title was free from complications with older surveys and conflicting claims except the small junior patents estimated to contain 2,500 or 3,000 acres (Record, pages 109 and 136).

Both Bell and Ferguson deny that Watts mentioned the Rutter and Etting patent during the negotiations which preceded the execution of the contract and which were carried on by Bell and Ferguson, representing Clark, and by Watts, representing Reeder (Record, pages 109, 137). Bell testifies he never heard of the Rutter and Etting until he read Ferguson's certificate which contains a reference to it, and that Watts was with him at the time, and that the reading of the opinion brought about a discussion between Watts and himself, and Watts concurred with Judge Ferguson, "that the portion of the Dillon survey that was interfered with or covered by the Rutter and Etting was only a small portion" (Record, page 137).

Ferguson testifies he never heard the Rutter and Etting mentioned in connection with the Dillon until Watts returned from his trip over the property with Camden to secure evidence of possession, and that then Watts told him of the interference between the two surveys. He "can't state with any certainty whether he (Watts) said anything as to when he obtained that information, but I know that I understood from what he said that he had learned of that interference on that trip;" that is, the trip from which he had just returned. "He represented that interference as but small and inconsiderable" (Record, page 111), and relying upon this representation, he (Ferguson) inserted in his certificate the paragraph quoted above (*supra*, page 3).

The case as presented by these witnesses is clearly sufficient to warrant and require a rescission of the contract, as will be fully shown later on by the citation of authorities, for the concealment by Reeder, the vendor, and by Watts, his agent, of this conflict of title, coupled with the fraudulent representation by Watts to Ferguson and Bell, that according to the best information he could obtain the interlock included only a small portion of the Dillon, when at the time he knew it included almost all of the Dillon, is enough to entitle the purchaser to relief; but the case becomes even stronger when we consider the testimony of Watts.

ANSWERS AND TESTIMONY OF C. C. WATTS.

We give below some quotations from the answers filed by Watts and from his testimony, to which we invite attention and ask the Court to bear in mind while reading them that Watts knew at the time the answers and the testimony were sworn to, and had known for some time previous, the fact that there was an interlock of the Dillon survey with the Rutter and Etting survey, and that the interlock covered more than three-fourths of the Dillon.

In his first answer we find the following (Record, pages 73, 74, 76):

"That the fact of an interlock between the Dillon survey and the Rutter and Etting survey was made known pending said negotiations by the said respondent to the said Bell, though he did not pretend to represent or to state to what extent the Rutter and Etting survey overlapped the Dillon, but on the contrary stated then and there to the said Bell that he had no means of knowing its extent.

"That respondent furthermore informed the said Bell, pending said negotiations of respondent's information, to the effect that some party, giving the name, but which name respondent cannot now recall, was claiming title to 10,000 acres of the Dillon land, or partly of the Dillon and partly of the Rutter and Etting survey, respondent does not now recollect certainly.

"That during respondent's call on the said Bell, in Staunton, Va., for the collection of the hand payment due upon said land, to wit, $35,000, to wit, on the 25th day of March, 1884, respondent showed the said Bell, on Swann's title map of West Virginia, the Rutter and Etting survey, under the name of the Duvall survey, and its location with reference to the Dillon survey of 50,096 acres of land aforesaid; that the said Bell remarked that, as appeared by the map, nearly the whole of the Dillon survey was covered by the Rutter and Etting survey, but that Judge Ferguson's opinion, which he regarded, as he said, a fine and clear opinion, showed conclusively that there could be no interference by the Rutter and Etting with the Dillon survey."

This is denied by Bell, who says, "I recollect very well his (Watts) assurance to me that Judge Ferguson's statement, in his opinion, in regard to the Dillon and Rutter and Etting surveys was correct" (Record, page 138). An examination of Swann's title map of West Virginia, which appears at page 150 of the Record, will show that although the Duvall survey is shown there the Dillon is not.

In the second answer filed by Watts we find the following (Record, pages 92–95):

"That respondent did, on the 29th day of February, 1884 make known to H. M. Bell, the party referred to in the pleadings in this cause, in the presence of James H. Ferguson, his counsel, the fact that an interlock existed between the Rutter and Etting and Dillon survey, and also the further fact that the Rutter and Etting was the older title; but respondent at the same time and in that connection called attention to the fact that the Rutter and Etting title had long since been forfeited and the land thereunder sold as delinquent and forfeited by Gen. Alfred Beckley, Commissioner of Delinquent and Forfeited Lands; that respondent then and there, to wit, on the 29th day of February, 1884, and in the room of the said H. M. Bell, in the city of Charleston, stated to the said Bell that he did not know the extent of said interlock; that the said James H. Ferguson stated that he had known the Dillon survey for many years and knew it was considered one of the best large surveys in the State; that he also knew the Rutter and Etting survey and knew of its forfeiture and sale thereunder by the said Beckley. Respondent incidentally mentioned to the said Bell and Ferguson, while the contract was being drafted, that he had in some way gotten the impression—he did not know how or from whom—that the interlock between the Rutter and Etting and Dillon surveys embraced some 5,000 or 6,000 acres, but that he did not know what foundation there was for such impression or how he got it; that he neither knew or had been able to learn to what extent said interlock really prevailed, and respondent did not then nor at any other time represent the quantity of acres contained in said interlock, nor did he then nor does he now know to what extent said interlock prevails.

"Respondent here refers to the 20th paragraph of his former answer filed in said cause, and again stated that he, on the 25th day of March, 1884, in Staunton, Va., showed the said Bell, agent of the plaintiff, on Swann's Title Map of West Virginia, the Rutter and Etting survey, which had been originally entered and surveyed in the name of William Duvall, and was so placed on said map, and the location of the Reeder lands of 50,096 acres, patented to Edward Dillon, with reference to the said Duvall or Rutter and Etting survey, the said Dillon survey not being named on said map. That the said Bell thereupon expressed the opinion that if the Duvall survey, as shown on said map, was really the Rutter and Etting, it covered nearly the whole of the territory pointed out by respondent as the Dillon survey, but observed that the opinion of Judge Ferguson, which he regarded as a very fine one, showed conclusively that there could be no interference by the Rutter and Etting with the Dillon survey.

"Respondent for answer to the interrogatories propounded to him by the plaintiff, says, that he had no knowledge before or at the date of the execution of said contract as to the extent of the interlock aforesaid, that he knew of the said Rutter and Etting survey and understood that it overlapped and interfered with the said Dillon survey, but to what extent he did not know, nor

does he now know. Pending the negotiations for said sale, commenced in January, 1884, and concluded in February of the same year, the respondent, as he now recollects, called upon his correspondent, Charles Reeder, in the city of Baltimore, and inquired if he, Reeder, knew the extent of said interlock and was informed by Mr. Reeder that he did not know the extent of said interlock, and had no means of knowing. Respondent here refers to and files herewith, as part of this answer, 'Exhibit I,' a letter from James H. McGinnis, Esq., of the county of Raleigh, and then attorney of the said Reeder, of date January 18th, 1884, and addressed to this respondent and which contains, among other things, the following language: 'You wish to know how much of the 50,096-acre tract is covered by Rutter and Etting. This information I cannot give with any degree of certainty. I think the parties, or the major portion of them, claiming under Rutter and Etting within the bounds of the interlock of these two surveys, have abandoned their claims, but to be certain of this, I cannot. But it is certain that many years elapsed without these claimants having their lands entered on the Commissioners' books, and I presume they have (been) forfeited for non-entry.' The foregoing letter is referred to to show that respondent endeavored to find out the extent of said interlock.

"Respondent has understood for many years, commencing when he lived in Wyoming County, in 1874 or 1874, that there was an interlock between the Rutter and Etting and Dillon survey. He never had any information, which he can recall, as to its extent. He had an impression, how he got it, or from whom, he cannot say, that the interlock embraced some 5,000 or 6,000 acres. He understood from Judge Evermont Ward, one of the former owners of this tract of land, and while the said Ward was Judge of the Wyoming Circuit Court, that there was an interlock between the two said surveys, but that the Rutter and Etting survey had long since been forfeited, and that the same did not in any way interfere with the Dillon title, and this understanding prevailed generally, among the people in and around Wyoming Court House.

"Respondent here states that all the information he had with reference to this interlock he imparted and made known to the said Bell as aforesaid at the time of the execution of said contract; that he made no concealment whatever with respect thereto, from either the said Bell or Ferguson, or Catlett, referred to in the former answer; that the information as to the fact of the interlock, so imparted by respondent as aforesaid, was itself treated by the said Ferguson and the said Bell as of little consequence, the said Ferguson himself stating that he knew of the forfeiture and sale of the Rutter and Etting survey as above set out."

This answer was sworn to by Watts on March 19th, 1887. Watts gave his testimony on this same day. In it we find the following (Record, pages 416, 417):

Q. "State whether or not at the time of the execution of the written contract between you and H. M. Bell, relative to the sale of the land, and filed

with the bill, you disclosed to the said Bell that there was an interlock between the Rutter and Etting and Dillon surveys, and the further fact, that the Rutter and Etting was the oldest grant, and the further fact, that the two grants included in part the same land?

A. "I did make all of said disclosures, and will further state that I informed the said Bell that the Dillon entry was the older, but the Rutter and Etting patent was the older. The Rutter and Etting and Dillon titles were talked over between Bell, Catlett, and myself, in my law office, on the 28th day of February, 1884, and again on the 29th of February, when James H. Ferguson was present, and again on the 29th of February in the room of the said Bell, at the Hale House, while Ferguson was drafting the contract between us. I gave Mr. Bell at the outset all the information that I possessed with reference to the conflict of titles—told him I wanted to keep nothing back from him—and exhibited to him both of my contracts filed in first answer in this cause, together with all the title papers of Mr. Reeder in my possession, and told him I wanted him to know everything that I knew about the land and my rights respecting the control of the same. I not only told Mr. Bell of the interlock between the Rutter and Etting and Dillon lands, but I also told him of the suit, some time before decided in Raleigh County, between Reeder and Cox, and of the further fact that the time was not yet out in which the decree in that cause could be reopened, and furnished him with the Hon. Samuel A. Miller's opinion in writing to the Dillon land titles."

And again (Record, pages 421, 422):

Q. "State whether or not in any of the conversation or negotiations had by you with H. M. Bell, at the time of the execution of the contract between you and himself, or prior thereto, or subsequent thereto, you made any representations to said Bell which were intended to, or calculated to, deceive him or mislead him with regard to the extent of the interlock between the Rutter and Etting and Dillon surveys, or whether you concealed from said Bell any facts known to you with regard to said interlock?

A. "I made no statements which were intended to deceive him or mislead him. I concealed from him no facts in my possession, and in stating to him my impression in some way obtained in reference to the quantity of said land, I stated distinctly that it was but an impression obtained somehow, but that I did not know how, and that it might be right or wrong, that I had no knowledge or accurate information upon which to rely as to the extent of said interlock.

"So far from concealing or intending to conceal from Mr. Bell any facts or information with reference to the interlock and its extent, while I was in Staunton, in said Bell's office, with the $25,000 unpaid draft in my pocket, I offered to show Mr. Bell where I had understood the interlock to prevail, naming Toney's Branch of the Clear Fork of the Guyandotte River as being the only place that I had ever heard mentioned as within said interlock; taking the map which he presented me, I first pointed out Oceana, and then Toney's Branch, a small stream emptying into the Clear Fork, about four miles

above and east of Oceana, and showed him in that connection that Duvall survey, the name in which the Rutter and Etting was first entered. Mr. Bell remarked that the Duvall survey embraced nearly the whole of that territory, and stated that if that was the Rutter and Etting survey, that nearly the entire territory was occupied by the Dillon survey. I replied that I had never so understood it, but as I had stated before, I did not know how much of the Dillon survey was included in the interlock. He stated that it was evidently nearly all covered, but that, however, that it was immaterial, as Judge Ferguson's written opinion, which he had then before him, showed clearly the forfeiture of the Rutter and Etting, and that it was not in the way of the Dillon survey."

All this reference to Swann's Title Map is denied by Bell (Record, pages 138, 150). It seems that Watts must have a very lively imagination, for by reference to Swann's Title Map (Record, page 150), it will be seen that neither Oceana, Toney's Branch, nor Clear Fork is shown on the map at all, and by reference to Captain Miller's map (Record, page 180), it will be seen that all of these places are laid down upon it, and it shows that the point where Toney's Branch empties into the Clear Fork is only about two miles above Oceana, and that it is not only not within the Rutter and Etting, but that it is not even within the Dillon.

And Watts says again (Record, pages 422–25):

A. "I did not state in words or substance that I knew of no title or claim older than the Dillon, and could not have so stated, truthfully, had I been disposed to make such statement. I did not state that I knew of no persons making claim to any of said land, as propounded in the question, but, on the contrary, did state that I understood some person from Pennsylvania, whose name I am now in doubt about, claimed or owned a part of the Rutter and Etting survey, and a part of whose claim was embraced in the interlock, or extended to that part of the Dillon survey interfered with by the Rutter and Etting, and further stated that one William Workman, of Boone County, was endeavoring to build up title, as I was informed, against Reeder, by having a tenant in possession under the Pennsylvania claimant. If I am not mistaken, and I don't think I am, I called attention to the further fact that Amos Workman and Mrs. Neal, of Boone County, were living on land which was understood to be embraced in the interlock. I did state that as to the Dillon survey not in said interlock, I knew of no person who was disputing Mr. Reeder's title or ownership to the Dillon survey besides the occupants and junior patentees other than certain parties named as defendants before that time in a certain suit pending and decided in the Circuit Court of Raleigh

County, wherein Dr. C. C. Cox, A. E. L. Keese, and William W. W. Yeager, *et als.* had been defendants. I did state that I was satisfied that the land claimed by the occupants and junior patentees to the Dillon survey not embraced in the interlock would not exceed 2,500 acres, or 3,000 acres at the most."

Q "When did you first learn of the existence of the Rutter and Etting survey, and to what extent, as you understood it at the time said contract was being written, did it interfere with the Dillon survey?

A. "The first that I remember to have learned of the existence of the Rutter and Etting survey was in 1873 or 1874, while residing at Oceana. At the time the contract was entered into I had no knowledge nor definite information as to the extent it interfered with the Dillon. I had an impression, from whom, or how I got it, I do not know, that the extent of the interference was some 5,000 or 6,000 acres, and that Toney's Branch of Clear Fork of Guyandotte was in the territory interfered with, and that Amos Workman and Mrs. Neal, at the head of Pond Fork of Little Coal, lived on the land covered by the Rutter and Etting survey, and inside the Dillon line. How I got this impression or information, or from whom, I do not know, but it was obtained in some way while I lived at Oceana. I communicated to Mr. Bell and to Judge Ferguson, at the time of the negotiation and execution of the contract, this impression, and stated to them that I did not know how I came by it, or how far it was correct, but such was my impression, and continued to be until M. A. Miller, surveyor, sent upon the land by E. W. Clark, or H. M. Bell, reported differently.

Q. "Did you at any time inform Mr. Reeder of the existence of the Rutter and Etting survey, and that it interfered with the Dillon survey, and, if so, when did you give him that information?

A. "I did inform Mr. Reeder of the existence of the Rutter and Etting survey, and of the interference existing, or interlock, between the two surveys, in 1873 or 1874, and advised him at the same time of the forfeiture of the Rutter and Etting, as learned from Evermont Ward, and that this title, in my opinion, was good as against Rutter and Etting, and got the benefit of the forfeiture of the Rutter and Etting as a junior patent to the land in the interlock. I had before that time advised him as his counsel that I regarded his title superior to Rutter and Etting by reason of this being the old entry, though the younger patent. About this proposition I have found I was probably in error, and talked with Judge Ward, from whom I learned of the forfeiture of the Rutter and Etting survey."

According to Watts's own testimony he mentioned the Rutter and Etting survey to Bell and Ferguson before the contract was executed. He told them that there was an interlock between the Dillon and the Rutter and Etting, but said that he did not know the extent of the interlock and had no means of knowing it. He told them he had an impression, although he could not

remember from what source derived, that the interlock included only about 5,000 or 6,000 acres. He told Ferguson that it was small and inconsiderable, and covered only a small portion of the Dillon. He told Bell the same thing. He testifies: "I gave Mr. Bell all the information I possessed with reference to the conflict of titles; told him I wanted to keep nothing back from him" (Record, page 417); "I made no statements which were intended to deceive him or mislead him; I concealed from him no facts in my possession" (Record, page 421). "At the time the contract was entered into I have no knowledge or definite information as to the extent it (Rutter and Etting) interfered with the Dillon" (Record, page 424). This testimony shows clearly that the question of the interlock was the subject of discussion between Watts on the one side and Bell and Ferguson on the other in the negotiations which led up to the making of the contract and the giving of the certificate of title by Ferguson, and that Watts undertook to give information upon a most material question affecting the title, to wit: the question of the extent of the interlock; that having undertaken to speak, he did not speak truly, is shown by the following testimony:

FACTS KNOWN TO AND CONCEALED BY REEDER AND WATTS.

Reeder swears (Record, page 432):

"In January, 1873, I had the land surveyed by Mr. W. T. Sarver, my agent, Mr. James A. Lownds (acting under power of attorney) being present. Mr. Sarver pointed out the place where the south line of the Rutter and Etting survey crosses the western side of the 'Dillon survey.' The same year I obtained certified copies of the original surveys and grants of both tracts, and, from the description of the last line (east line) of the Rutter and Etting survey crossing the headwaters of the Guyandotte, it did not seem probable that this survey ran entirely across the 'Dillon survey.' Exactly how much land was embraced in the interlock was not known, and I did not consider it important to know, as I was advised by my counsel, and had good authority for believing, that the 'Dillon title' would unquestionably hold as against the Rutter and Etting, and consequently as against titles derived from the Rutter and Etting."

Reeder sent the paper to Watts, for Watts wrote to him under date of November 8th, 1873, as follows (Record, p. 442):

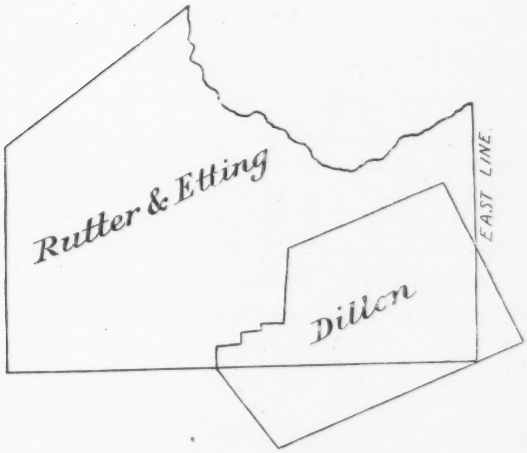
"OCEANA, W. VA., Nov. 8th, 1873.

"*C. Reeder, Esq.*

"MY DEAR SIR:—Your favor, together with copies of 'Duvall survey and grants,' 'Dillon survey and grant,' and 'sketch of location,' dated and postmarked October 24th, 1873, came to hand 30th of same month."

The "sketch of location" to which Watts referred is a part of Exhibit C. R. No. 3 (Record, p. 444), and as this exhibit is very important we print it here in full.

"Exhibit C. R. No. 3.



"The above sketch is about the same size and shows the same relative position of the Dillon and the Rutter and Etting surveys as the sketch mentioned in Mr. C. C. Watts' letter dated November 8th, 1873, the lines crossing at the place pointed out by Mr. W. T. Sarver, and the last line (east line) of the Rutter and Etting crossing the waters called for on that line, the Rutter and Etting survey covering three-fourths of the Dillon, according to the information I then had. It will be seen that Mr. Watts does not accept my sketch as an established fact, but Judge Ward's opinion is based on a conflict of title, such as the sketch represents. From Judge Ward's opinion I was led to believe that it makes no difference how much or how little of the Dillon survey is

covered by the Rutter and Etting. This belief has been confirmed by the opinion of Judge Ferguson, who, acting as a third party between the two contracting parties, by whom he was authorized to examine and determine, on his own investigation, not on the opinion of others, whether the contract should or should not become binding, made a report of the result of his examination, which report gave vitality to the contract. Judge Ferguson's opinion, like that of Judge Ward's, applies with equal force to a large portion as it does to a small portion of the survey.

(Signed) "CHARLES REEDER."

Watts no doubt had this sketch in Charleston with Reeder's other title papers when the contract was signed, for Reeder in his answer (Record, pages 90–1) says:

"About the latter part of December, 1883, or the beginning of January, 1884, and before the contract of the 29th of February was made, I sent all my title papers to Charleston, W. Va., for examination."

He testifies on cross-examination (Record, page 435, 12th cross-ques.):

"*A.* Nearly all of my title papers are in the hands of the plaintiff, I suppose; they were sent to Charleston for the purpose of examining my title. I have since written for some of these papers, and have received one or two; which of them I do not recollect. If I have received back the original certified copies I will file them with my answer."

The witness finds the certified copies of the two surveys and files them with his answer, and at the end of that answer says:

"I also file, marked 'Exhibit C. R. No. 3,' copy of the sketch referred to in Mr. Watts' letter of November 8th, 1873, and an explanation of the sketch."

It is hard to imagine a clearer case of fraudulent misrepresentations and concealment of material facts with intent to mislead and deceive. A contract procured by such means cannot stand. The purchaser is clearly entitled to rescind. The purpose of the misrepresentations and concealment is evident. For if Bell or Ferguson or Clark should learn of the extent of the interlock before the contract was consummated, Watts knew very well that they would not buy the land. This must be concealed from them at all hazards, or he would lose his $10,000 commission and Reeder would lose the sale. Even when the extent of the interlock was discovered by Surveyor Miller and reported upon Watts still hoped to hold Clark to the contract,

for the fact that Watts and Reeder had known the extent of the interlock for many years was still unknown to Clark and his agents, and if it could be concealed from them and not developed in the case, Watts hoped that the Court would decree specific performance of the contract. He almost succeeded in concealing this all-important fact, and in his efforts to do so he said many things which he knew were untrue. This fact was, however, developed later in the case in the cross-examination of Reeder, and as one result Watts finds himself in a very awkward situation on account of the answers and testimony he has given under oath.

FRAUDULENT ACTS AND MISREPRESENTATIONS.

The following is an analysis of the fraudulent acts and misrepresentations upon which Clark relies. If we adopt the facts sworn to by Watts we have:

1. The representation of Watts to Bell and Ferguson before the contract was executed, that there was an interlock between the Dillon and the Rutter and Etting and that the latter was the older patent, and that he (Watts) did not know, had no means of knowing, and had not been able to learn the extent of the interlock, that he had no knowledge or accurate information upon which to rely as to its extent.

2. The representation of Watts to Bell and Ferguson that he had gotten the impression, he did not know how or from whom, that the interlock embraced some 5,000 or 6,000 acres.

3. The representation of Watts to Bell and Ferguson that there was some one from Pennsylvania claiming a part of the interlock under the Rutter and Etting title and had a tenant on it, William Workman, endeavoring to build up a title against Reeder, and that others unknown to him might set up claims. Also, that he had an impression that Amos Workman and Mrs. Neal, at the head of Pond Fork of Little Coal lived on the interlock.

These were representations in regard to the interlock which

show that it was discussed. Under such circumstances it became the duty of Watts to tell all he knew, though, it appears, he concealed the most important part of his information. His representations, being only half the truth, were misrepresentations.

On the supposition that Bell and Ferguson have given the correct version we have:

4. The concealment by Watts of the existence and extent of the interlock until after his return from his trip over the property with Camden.

5. The representation at the time the contract was entered into that there were no complications with older surveys.

Considering only the facts upon which all the witnesses agree we have:

6. The representation of Watts to Bell that he wanted to keep nothing back from him, and wanted him to know everything that he (Watts) knew about the land.

7. Reeder's concealment of the existence and extent of the interlock, at the interview between Reeder, Watts, and Bell in Baltimore, on March 3d, 1884, when the contract and the question of adverse titles were discussed.

8. The representation of Watts to Ferguson after he came back from his trip over the property with Camden, that the interlock was *small and inconsiderable.*

9. The representation of Watts, which he made in writing Ferguson's certificate, that there is, from the best information obtainable, a *small portion* of the Rutter and Etting survey embraced within the Dillon.

10. The representation of Watts to Bell, made when delivering Ferguson's certificate to him, that the statement therein contained that a *small portion* of the Rutter and Etting survey was embraced within the Dillon was correct.

11. The representation of Watts to Bell, when they were discussing the interlock, on March 25th, 1884, with Swann's Title Map before them, that he had not understood that the interlock was large.

12. The representation of Watts, which is implied from his

false opinion that the interlock was small and inconsiderable, to the effect that he knew of no facts inconsistent with that opinion nor had any reason to believe the contrary.

13. The representation of Reeder, in April, 1885, contained in Exhibit McC., that the Rutter and Etting does not, *to any appreciable extent, interlock* Dillon.

14. The sworn testimony of Watts, given in this case before his knowledge on the subject was developed by the cross-examination of Reeder, that he did not know and had not been able to learn the extent of the interlock; that he called upon Reeder to inquire if he knew the extent of the interlock, and was informed that he did not and had no means of knowing it; that he wrote to McGinnis asking him the same question, and he gives his answer, and refers to it to show his efforts to find out the extent of the interlock; that he told Bell and Ferguson everything he knew about the land and concealed nothing from them.

This shows how unreliable Watts is. He is certainly not entitled to any consideration in a court of equity.

CASES AND AUTHORITIES.

In Story's Equity, Vol. I, page 231, we find:

"Thus, if a vendor should sell an estate knowing that he had no title to it, or knowing that there were encumbrances on it of which the vendee was ignorant, the suppression of such a material fact, in respect to which the vendor must know that the very purchase implied a trust or confidence on the part of the vendee that no such defect existed, would clearly avoid the sale on the ground of fraud."

In Minor's Institutes, Vol. II, page 701 (625), we find:

"Where an act is done or a conveyance executed under a mistake or ignorance of matter of fact material to the transaction and an efficient inducement thereto, the general rule is that a court of equity will relieve by setting the conveyance or act aside. Thus, if A buys land of B to which B is supposed to have a good title, and it turns out that in consequence of facts unknown alike to both parties he has no title at all, equity will cancel the transaction and cause the purchase-money to be restored to A, putting both parties in *statu quo*."

show that it was discussed. Under such circumstances it became the duty of Watts to tell all he knew, though, it appears, he concealed the most important part of his information. His representations, being only half the truth, were misrepresentations.

On the supposition that Bell and Ferguson have given the correct version we have:

4. The concealment by Watts of the existence and extent of the interlock until after his return from his trip over the property with Camden.

5. The representation at the time the contract was entered into that there were no complications with older surveys.

Considering only the facts upon which all the witnesses agree we have:

6. The representation of Watts to Bell that he wanted to keep nothing back from him, and wanted him to know everything that he (Watts) knew about the land.

7. Reeder's concealment of the existence and extent of the interlock, at the interview between Reeder, Watts, and Bell in Baltimore, on March 3d, 1884, when the contract and the question of adverse titles were discussed.

8. The representation of Watts to Ferguson after he came back from his trip over the property with Camden, that the interlock was *small and inconsiderable.*

9. The representation of Watts, which he made in writing Ferguson's certificate, that there is, from the best information obtainable, a *small portion* of the Rutter and Etting survey embraced within the Dillon.

10. The representation of Watts to Bell, made when delivering Ferguson's certificate to him, that the statement therein contained that a *small portion* of the Rutter and Etting survey was embraced within the Dillon was correct.

11. The representation of Watts to Bell, when they were discussing the interlock, on March 25th, 1884, with Swann's Title Map before them, that he had not understood that the interlock was large.

12. The representation of Watts, which is implied from his

false opinion that the interlock was small and inconsiderable, to the effect that he knew of no facts inconsistent with that opinion nor had any reason to believe the contrary.

13. The representation of Reeder, in April, 1885, contained in Exhibit McC., that the Rutter and Etting does not, *to any appreciable extent, interlock* Dillon.

14. The sworn testimony of Watts, given in this case before his knowledge on the subject was developed by the cross-examination of Reeder, that he did not know and had not been able to learn the extent of the interlock; that he called upon Reeder to inquire if he knew the extent of the interlock, and was informed that he did not and had no means of knowing it; that he wrote to McGinnis asking him the same question, and he gives his answer, and refers to it to show his efforts to find out the extent of the interlock; that he told Bell and Ferguson everything he knew about the land and concealed nothing from them.

This shows how unreliable Watts is. He is certainly not entitled to any consideration in a court of equity.

CASES AND AUTHORITIES.

In Story's Equity, Vol. I, page 231, we find:

"Thus, if a vendor should sell an estate knowing that he had no title to it, or knowing that there were encumbrances on it of which the vendee was ignorant, the suppression of such a material fact, in respect to which the vendor must know that the very purchase implied a trust or confidence on the part of the vendee that no such defect existed, would clearly avoid the sale on the ground of fraud."

In Minor's Institutes, Vol. II, page 701 (625), we find:

"Where an act is done or a conveyance executed under a mistake or ignorance of matter of fact material to the transaction and an efficient inducement thereto, the general rule is that a court of equity will relieve by setting the conveyance or act aside. Thus, if A buys land of B to which B is supposed to have a good title, and it turns out that in consequence of facts unknown alike to both parties he has no title at all, equity will cancel the transaction and cause the purchase-money to be restored to A, putting both parties in *statu quo*."

In Beach on Modern Equity Jurisprudence, § 634, we find:

"So the Court will rescind the contract where a vendor does not disclose a material defect in the title or designedly makes false representations, the falsehood of which the purchaser has no means of knowing, or where there is a clear mistake on both sides."

Sugden on Vendors, Vol. I (8 Amer. Ed.), chap. 5, § 5, page 370:

"The right to rescind a contract arises either before the completion of it (as for the want of title for example) or after the contract is completed. . . . Where representations are made with respect to the nature and character of the property which is to become the subject of purchase affecting the value of that property, and those representations afterward turn out to be incorrect and false to the knowledge of the party making them, a foundation is laid for maintaining an action for recovery of damages for the deceit so practiced; and in a court of equity a foundation is laid for setting aside the contract which was founded upon a fraudulent basis."

Page 375.—"In a case where the sellers knew of a defect in the title to a part of the estate which was material to the enjoyment of the rest, and did not disclose the fact to the purchaser, and it could not be collected from the abstract, the purchaser was relieved against the purchase in equity, *the sellers were decreed to repay the purchase-money with costs*, and likewise all expenses which the purchaser had been put to relative to the sale, together with an allowance for any money he laid out in repairs during the time he was in possession. (Citing a lot of English cases.) It was in this case laid down that if one party makes a representation which he knows to be false but the falsity of which the other party had no means of knowing the Court will rescind the contract. (Citing 2 Swa. 287.) It was observed by Sir W. Grant that whether it would be a fraud to offer as good a title which the vendor knew to be defective, it was not necessary to determine, but if he knows and conceals a fact material to the validity of the title he was not aware of any principle on which relief could be refused to a purchaser."

In Wait's Actions and Defences, Vol. V, page 513, we find:

"Nothing is clearer than the doctrine that a bargain founded in a mutual mistake of the facts constituting the essence of the contract, or founded upon representations of the seller material to the bargain and constituting the essence thereof, will avoid it, although made by innocent mistake. *Daniel* vs. *Mitchell*, 1 Story (C. C.), 173; *Glassell* vs. *Thomas*, 3 Leigh (Va.), 113; *Hammon* vs. *Allen*, 2 Sumner (C. C.), 387."

And again, page 514:

"A vendee may have rescission of the contract on the ground of mistake when it appears that his vendor supposed that he had a title when he had none.

The vendee cannot be compelled to rely on his warranty to pay the purchase-money. . . . Fraudulent misrepresentations and concealment by a vendor of land as to the nature, quality and quantity thereof affecting the whole subject-matter of the contract entitles the vendee to a rescission of the contract, and he will not be put to his remedy at law for compensation in damages. *Spence* vs. *Duren*, 3 Ala. 251; *Stephenson* vs. *Taylor*, 1 A. K. Marsh (Ky.), 235; *Boyce* vs. *Grundy*, 3 Peters, 210."

In *Bailey* vs. *James*, 11 Gratt. 468, the syllabus reads:

"Where the contract for the sale of land is entire, for a specific sum of money, and the title to a part of it fails from a cause of which both vendor and vendee were ignorant, it is ground for the rescission of the whole contract, but the vendee cannot insist upon a partial rescission."

In *Gill* vs. *Corbin*, 4 J. J. Marshall (Ky.), 392, the syllabus reads:

"Purchaser induced by representations of an agent 'that his principal is able to make a valid title' buys land; afterward purchaser files bill to obtain rescission of the contract for want of title in principal; if principal failed to exhibit valid title contract will be rescinded and collection of purchase-money perpetually enjoined."

In *Daggett* vs. *Emerson*, 3 Story, 733, Story, J., says:

"The whole doctrine turns upon this, that he who misleads the confidence of another by false statements in the substance of a purchase shall be the sufferer, and not his victim."

In *Kennedy* vs. *Johnson*, 2 Bibb (Ky.), 12, the syllabus reads:

"The contract for purchase and sale of a tract of land rescinded because the seller, knowing the inducement to the purchaser to be the acquisition of the elder legal title, and knowing his grant to be of junior date, did not disclose the fact."

The Court said:

"When contracts affect the translation of property, justice requires of the contracting parties a disclosure of its particular qualities and real value so far as they possess them. Without this they would be unable to estimate their true interest, nor would they (if the property possessed qualities different from what was supposed at the time of the contract) be presumed to have given that free assent necessary to constitute one. It appears in this cause that the Johnsons at the time of making the purchase believed Kennedy had the elder patent, and, although he knew to the contrary, sold to them under that delusion. If there be error in the thing or subject contracted for, the contract is null in itself (1 Fon. 108), much more ought the contract or agreement to be

considered as null and void when the mistake has been accompanied with fraud and circumvention. The failure on the part of Kennedy to declare the true situation of the titles when he had every reason to believe the Johnsons were moved to make the purchase under the belief that the patent was the eldest, was a clear and manifest fraud. It is laid down as a constant rule in chancery that when there is *suppressio veri* or *suggestio falsi* the deed or release should be avoided (1 Fon. 113, and the cases there cited).

"We have no hesitation in saying if the suppression or suggestion be of those things which induce the contract, equity ought to give relief."

In re Banister, 12 Ch. Div. 131, the syllabus reads:

"A condition of sale is bad as misleading: 1, if it requires the purchaser to assume what the vendor knows to be false; 2, if it states that the state of the title is not accurately known when, in fact, it is known to the vendor.

"At a sale of the fee simple of a farm under the order of a court there was a condition that a declaration by the tenant should be produced to the purchaser that the farm was taken by him from E in October, 1835, and had since been held by him of her and those claiming under her in succession. The condition provided that the purchaser should be satisfied with the title so made without the production of any document previous to the sale of E in 1860, who should be assumed to have been seized in fee simple in possession free from encumbrance in October, 1835, and up to and at her death. The condition further stated that it was not accurately known and could not be satisfactorily explained how she acquired the property, and it was expressly stipulated that no other title than as above should be required or inquired into.

"The purchaser, after an abstract of title in accordance with the condition had been furnished to him, discovered that E was a mortgagee in possession, and had no title against the mortgagor, except under the statute of limitations by adverse possession commencing in 1844, and that her executor in 1861 had paid legacy duty on the mortgage debt, and not succession duty on the estate. These facts were well known to the vendor."

Jessel, M. R., says:

"What he (the purchaser) complains of is this. He says: 'I bought under conditions which were not truly framed, which contained representations, either expressed or implied, which are untrue, and were untrue to the knowledge of the vendor at the time those conditions were framed. Now, if they were untrue in fact, and the real facts were known to the vendor, however innocent the vendor may be of intentional misrepresentation (for the actual vendor, the trustee, took all the precautions to get the conditions properly framed), still those are untrue representations of the vendor; and therefore if it is shown that the material statements made were either expressly or impliedly made were untrue, then I think the purchaser cannot

be held to be bound by the condition—that is, bound to the extent of being compelled to take the title."

In *White* vs. *Flora*, 2 Overton (Tenn.), 426, it was decided that the concealment of a truth which, if correctly known, would probably be a reason for making the terms of the contract different is a good ground for rescinding the contract in equity. See also:

Edwards vs. *McLeay*, Coop. 308;
Snelson vs. *Franklin*, 6 Munf. 210;
M'Neil vs. *Baird*, 6 Munf. 316;
Pollard vs. *Rogers*, 4 Call, 239;
White vs. *Cox*, 3 Hayw. 79;
Rawdon vs. *Blatchford*, 1 Sandf. Ch. 344;
Brown vs. *Gray*, 6 Jones (N. C.), 103.

The seller must disclose a latent defect.

Patterson vs. *Kirkland*, 34 Miss. 423;
McAdams vs. *Cates*, 24 Mo. 223;
Barron vs. *Alexander*, 27 Mo. 530;
Cecil vs *Eckols*, 32 Mo. 462;
Merritt vs. *Robinson*, 35 Ark. 483;
Lunn vs. *Shermer*, 93 N. C. 164.

In *Hall* vs. *Gray*, 1 Stark. 434, the seller knew that the purchaser of a picture was laboring under the delusion that the picture had been the property of Sir Felix Agar. The seller sued the purchaser for the price and was non-suited. From the report it would appear that Lord Ellenborough held that silence alone was fraudulent concealment, but this was explained in *Keates* vs. *Cadogan*, 2 Eng. 318, where Jarvis, C. J., said that in *Hill* vs. *Gray* there was "positive aggressive" deceit. "Not removing the delusion might be equivalent to an express misrepresentation."

In *Oswald* vs. *McGehee*, 28 Miss. 340, a sale of a plantation was rescinded on the ground of fraudulent concealment and misrepresentations of the vendor in regard to the coco grass, which was injurious to cattle. The vendor said there was coco "in the garden and in one of his negro men's patches, and

that it might be in some other spot, but he did not know." The coco grass was really scattered all about the plantation. The Court held that the vendor knew or ought to have known this, and rescinded the contract.

The case of *Camp* vs. *Camp*, 2 Ala. 632, is almost exactly like the case before us. The syllabus reads:

"Where C, about to sell a tract of land, represented to the proposed purchaser that an open, unmarked line would run in such a direction as to include a field of forty acres of rich bottom land on an adjoining tract, when he had been previously informed by the owner of the land that he had made an experimental survey and found that the line would run so as not to include the field as part of the land of C, which, upon a survey, was found to be a fact; *Held*, that this was such a fraudulent misrepresentation of a material fact as would authorize a court of chancery to rescind the contract."

We quote the following from the opinion:

"The defense set up by the answer and by the argument of counsel is that the representations were matter of opinion merely. The proof is conclusive to show that the representations were made, and that the defendant, before the sale, had information that the line did not run as he represented it.

"An examination of the case has satisfied us that the contract was obtained by the representations of the defendant of material facts which he must have known at the time to be untrue, and also, that he concealed material facts within his knowledge which fair dealing required that he should have disclosed.

"It is certainly true that the course of the unmarked line to one who had no other guide than the extreme points would be matter of opinion or conjecture. Is the conduct explicable on this hypothesis? It has already been remarked that as the owner of the land he must have felt considerable interest in ascertaining this fact. When this is considered in connection with the manner in which the information was given, the precise spot where the line would enter the field, the indication of its precise course through the field, the quantity of fine land which would be then added to a tract which appears to be quite sterile, there can be little doubt of the *quo animo*. But where to this is added the startling fact that he was informed by one who had run the line that it was different from his representations of it, but little doubt can exist that the intention was to deceive. The principles of justice and fair dealing demanded of him a disclosure that though such was his opinion (if, in fact, he entertained it), that the line had been run out by another, and that by his survey the field was excluded. Had he done so there can be no doubt that the purchaser would have insisted on a survey of the land to ascertain its true boundary. It is impossible not to see in the whole conduct of the defendant a studied attempt to deceive, not only by the assertion of a fact which he either knew nothing about or knew to be untrue, and also by the conceal-

ment of a fact which, if disclosed, would have deprived his assertions of any claim to belief.

"It is contended that the law will not assist a purchaser who does not inquire and examine for himself, but supinely rests on the opinions of those with whom he is dealing. The true meaning of this rule is that the purchaser must judge for himself as to all those matters which lie in opinion merely; as, for example, as to the value or quantity of the article he is about to purchase; assertions upon these matters by the vendor should pass for nothing; so also if he should falsely attempt to bolster up his declarations by imaginary opinions of others. These are the common artifices or tricks of trade which every one competent to make a contract is by law presumed able to guard against. Nor is the seller under any legal obligation to call the attention of the purchaser to these qualities of the article offered for sale open to common observation which depreciate its value, but he must not resort to any artifices to conceal them.

"But the law is not so destitute of morality as not to require each of the contracting parties to disclose to the other all material facts of which he has knowledge and of which he knows the other to be ignorant, unless they are open to common observation; and not to forbid any intentional concealment or suppression of the material facts necessary to be known and to which the other has not equal access or means of ascertaining. (2 Kent's Com., 1st ed. 377, and cases cited in support of text.)

"It is true the complainant might have refused his confidence to the representations of the defendant and insisted on a survey to ascertain the boundary, but whilst the law exacts ordinary care and diligence on the part of the purchaser to ascertain the quality and quantity of the article he is about to purchase, and 'does not go to the romantic length of giving indemnity against the consequences of indolence or folly or careless indifference to the *ordinary* and *accessible* means of information,' it does not exact *extraordinary* diligence, but as to those facts which by ordinary diligence could not be ascertained, it permits a reliance on the assertions of the party who from his opportunities has the means of knowledge.

"Thus, at the last term, in the case of *Young* vs. *Harris, Admr.*, this Court relieved a purchaser who was a stranger in the country and relied on the assertion of the vendor that he had the title when in fact the land had been entered in the name of an infant son of the vendor, which could have been ascertained by application at the land office, and on the ground that when there was no cause for distrust such extreme diligence was not required. So in this case, the complainant might have insisted on a survey of the land, but we cannot think he was guilty of folly or supine indolence in trusting to the positive declarations of one who from his situation might well be presumed to know the facts he undertook to state, and from his relationship it might be supposed he would not voluntarily deceive."

This case is very much in point. The character of the misrepresentations were the same there as here—the location of the

land lines. The nature of the fact concealed was the same—the proper location of the lines as shown by actual survey.

In *Smith* vs. *Richards*, 38 U. S. 26, the syllabus reads as follows:

"A bill was filed in the Circuit Court of the Southern District of New York, praying that a contract for the purchase and sale of a portion of a tract of land in Goochland County, in the Sate of Virginia, on which there was a gold mine, should be rescinded. The purchaser alleged fraudulent misrepresentations as to the gold mine, and other arts of the seller, by which he was induced to make the purchase. The Court affirmed the decree of the Circuit Court of the Southern District of New York, by which the contract was ordered to be rescinded.

"It is an ancient and well-established principle that whenever *suppressio veri* or *suggestio falsi* occur, and more especially both together, they afford sufficient ground to set aside any release or conveyance.

"The party selling property must be presumed to know whether the representation which he makes of it is true or false. If he knows it to be false, that is a fraud of the most positive kind; but if he does not know it, then it can only be from gross negligence; and in contemplation of a court of equity, representations founded on a mistake resulting from such negligence is fraud. The purchaser confides in them upon the assumption that the owner knows his own property and truly represents it. And it is immaterial to the purchaser whether the misrepresentation proceeded from mistake or fraud. The injury to him is the same whatever may have been the motives of the seller. The misrepresentations of the seller of property, to authorize the rescinding a contract of sale by a court of equity, must be of something material, constituting an inducement or motive to purchsse, and by which he has been misled to his injury. It must be in something in which the one party places a known trust and confidence in the other.

"Whenever a sale is made of property not present, but at a remote distance, which the seller knows the purchaser has not seen, but which he buys upon the representation of the seller, relying on its truth, then the representation in effect amounts to a warranty; at least the seller is bound to make good the representation."

In this case the plaintiffs had written to the defendants: "In regard to the extent of the mine and its richness, we must, of course, rely on your judgment," and the defendant had replied, speaking of the gold mine: "I, however, sell it for what it is, gold or snowballs; and I leave it to you to decide whether you will take it at my price or not."

Stewart vs. *Wyoming Cattle Ranche Co.*, 128 U. S. 383, was an action to recover damages for false representations in regard

to a herd of cattle, the amount of their increase, the number in the herd, etc., at the time they were sold. The jury gave the plaintiff $55,000 damages, and the Supreme Court affirmed the judgment. Mr. Justice Gray said:

"In an action of deceit, it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment; *Aliud est tacere, aliud celare;* a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."

Farrar vs. *Churchill,* 135 U. S. 609, is a case where an attempt was made to rescind a contract of sale of a plantation on the Mississippi River, and to cancel a deed for the same on the ground of fraudulent misrepresentations as to the quantity, quality, conditions, and boundaries of the land.

No fraud was proven, and on the other hand it was proven that the plaintiff had made an independent examination for himself before purchasing. The Court would not rescind the contract.

Farnsworth vs. *Duffner*, 142 U. S. 43, is the latest case in this Court on this general subject.

It was a chancery proceeding to rescind a contract for the purchase of a tract of land and to recover the purchase-money. The land was a tract of 40,000 acres, lying in Upshur County, West Virginia. The Circuit Court for the District of West Virginia rescinded the contract, but this decision was reversed in this Court. At the end of the opinion Mr. Justice Brewer, in summing up the case, said:

"The vendors pretended to sell only a tax title. They specially guarded themselves against any rights of actual settlers. The validity of their title and the extent of it were matters apparent on the records, and open to the inspection of the purchaser. He did not act on their representations that the title was good, but brought his own counsel from home to examine those records, and acted upon his judgment of the title. The conduct of the defend-

ants supports their testimony, that they believed there was validity to their title. The particular statements complained of as against one of these appellants were true in fact, and, if not true, were not of a character to avoid the purchase. The wrong which these two appellants are specially charged to have been guilty of was a wrong against their associates and not against the purchaser, nor one of which he can take advantage. It follows, therefore, that there was no such showing made as would justify a Court in rescinding the contract of purchase, and decreeing a repayment of the money."

The wrong of which he speaks was the taking of a large commission from their associates. It had no bearing upon the right of the plaintiffs to rescind. The plaintiffs bought the property, paid for it, and took a deed, after having the title fully examined by their own attorney. They then found that the title was complicated and probably bad. They charged the defendants with fraudulent misrepresentations, but they did not sustain these charges with any proof. In this case there were no fraudulent misrepresentations or concealment of material facts proven against the defendants. Of course, the gist of the case before us is that such fraudulent misrepresentations and concealment of material facts have been fully proven.

Bell and Ferguson both testify that Reeder and Watts represented Reeder's title as good.

The contract is of itself a representation that the vendor has a good title.

In *Green* vs. *Chandler*, 25 Texas, 148, we find:

"First, that Chandler represented his title to be good at the time of the sale and that he (Green) purchased relying upon such representation.

"It will be proper to consider the subject upon the supposition that the representation was not fraudulently made and did not deceive Green in the purchase. This representation in the absence of fraud is nothing more than what is implied from the execution of the bond from Chandler and wife to Green. The fact that a party undertakes to sell implies an affirmation on his part that he has such title on his part as he binds himself to convey. (3 Blackstone, 451; Story on Sales, 367; 9 Price (Eng. Exchq.) 488; *Purvis* vs. *Royer;* and 5 Barn. & Adolph. 922, *Sutor* vs. *Drake.*)"

Also in Sugden on Vendors, Vol. I (8th Am. Ed.), Chap. 1, § 2, p. 24, we find:

"It should be borne in mind that in contracts for the sale of real estate an agreement to make a good title is always implied unless the liability is expressly excluded."

See also,

Shrech vs. *Pierce*, 3 Ia. 350;
Warvelle on Vendors, Ch. 31, § 10, p. 843.

The relationship of vendor and vendee is not usually considered a fiduciary one, and the vendor need not tell the vendee everything he knows in regard to the nature, quality, etc., of the land he is selling; but the vendor represents by his contract that he has a good *title*, and therefore this rule does not hold good where the vendor conceals a defect in his title. The same is true in the case of a vendee. He need not tell the vendor all that he knows in regard to the property. In Story's Equity Jurisp., Vol. I, p. 230, note 5, we find the following:

"The purchaser of a tract of land, knowing that there is a mine under it, need not tell the vendor. 'He acts for himself, and exercises his own sense and knowledge. But a very little is sufficient to affect the application of the principle. If a single word is dropped which tends to mislead the vendor, that principle will not be allowed to operate.' The above words in quotation are the words of Lord Eldon, in *Turner* vs. *Harvey*, Jacob R. 178."

This rule applies equally as well to the vendor as to the vendee. The vendee, as suggested above, will be relieved against a concealment by the vendor of a defect in his title. If, instead of simply concealing the defect, a single word is dropped which tends to mislead, the vendee is all the more entitled to relief.

Davies vs. *Cooper*, 5 My. & Cr. 270;
Laidlaw vs. *Organ*, 2 Wheat. 178;
Biggs vs. *Perkins*, 75 N. C. 397;
Baker vs. *Seahorn*, 1 Swan, 54;
Patterson vs. *Kirkland*, 34 Miss. 423.

These principles were applied to a breach of promise case in *Van Houten* vs. *Morse*, 38 N. E. (Mass.) 705. The syllabus reads:

"If plaintiff undertook to state material facts relating to her history, she was bound not only to state truly the facts narrated, but was bound not to suppress facts necessary to a correct understanding thereof; and, if she willfully concealed such facts, she was guilty of fraudulent concealment."

In support of this proposition the Court cites:

Kidney vs. *Stoddard*, 7 Metc. (Mass.) 252;
Short vs. *Currier*, 153 Mass. 182; 26 N. E. 444;

Burns vs. *Dockray*, 156 Mass. 135, 137; 30 N. E. 551;
Prentiss vs. *Russ*, 16 Me. 30;
Atwood vs. *Chapman*, 68 Me. 38, 40, 41;
Potts vs. *Chapin*, 133 Mass. 276;
Clark vs. *Baird*, 9 N. Y. 183;
Brown vs. *Montgomery*, 20 N. Y. 287;
Devoe vs. *Brandt*, 53 N. Y. 462;
Stevens vs. *Adamson*, 2 Starkie, 422;
Hill vs. *Gray*, 1 Starkie, 434;
Arkwright vs. *Newbold*, 17 Ch. Div. 301, 317, 318;
Aortson vs. *Ridgway*, 18 Ill. 23;
Add. Torts, § 1205.

On the general subject of rescission on the ground of fraudulent misrepresentations and concealment of material facts, see also:

Chamberlain vs. *Marsh*, 6 Munf. 283;
Tucker vs. *Cocke*, 2 Rand. 51;
Thompson vs. *Jackson*, 3 Rand. 504;
Irick vs. *Fulton*, 3 Gratt. 193;
Bowles vs. *Woodson*, 6 Gratt. 78;
Clark vs. *Hardgrove*, 7 Gratt. 399;
Leas vs. *Eidson*, 9 Gratt. 277;
Grim vs. *Byrd*, 32 Gratt. 293;
Bank vs. *Campbell*, 75 Va. 455;
Ferry vs. *Clark*, 77 Va. 397;
Va. Ins. Co. vs. *Cottrell*, 9 S. E. 132;
Pratt vs. *Bowman*, 17 S. E. (W. Va.) 210;
Hall vs. *Thompson*, 1 Smedes & M. 443;
Crutchfield vs. *Danilly*, 16 Ga. 432;
Smith vs. *Robertson*, 23 Ala. 312;
Prout vs. *Roberts*, 32 Ala. 427;
Green vs. *Chandler*, 25 Tex. 148;
Baird vs. *Lacvison*, 15 S. W. (Ky.) 252;
Orendorf vs. *Tallman*, 7 So. (Ala.) 821;
Mead vs. *Altgeld*, 26 N. E. (Ill.) 388;
Boyd vs. *McCullough*, 137 Pa. 7;
Haygarth vs. *Wearing*, L. R. 12 Eq. 320, 329;
McFerran vs. *Taylor*, 3 Cranch. 270;
Grymes vs. *Sanders*, 93 U. S. 55;
Southern Dev. Co. vs. *Silva*, 125 U. S. 247;
Cleaveland vs. *Smith*, 132 U. S. 318;
Tyler vs. *Savage*, 143 U. S. 79;
Pope Mfg. Co. vs. *Gormully*, 144 U. S. 224;
Story Eq., Vol. II, § 693;

Pothier De Vente, Nos. 233 to 241, of which an interesting translation appears in a note to *Laidlaw* vs. *Organ*, 2 Wheat. 178, in the Lawyer's Co-op. Pub. Co. edition.

THE FACTS PROVEN FULFILL ALL THE CONDITIONS WHICH EQUITY REQUIRES IN ORDER TO ENTITLE THE PLAINTIFF TO RELIEF.

In *Southern Development Co.* vs. *Silva*, 125 U. S. 247, this Court lays down certain principles governing cases of this kind. The Court said that, to establish a charge of this character, the complainant must show:

"First, That the defendant has made a representation in regard to a material *fact*;

"Secondly, That such representation is false;

"Thirdly, That such representation was not actually believed by the defendant, on reasonable grounds, to be true;

"Fourthly. That it was made with intent that it should be acted on;

"Fifthly, That it was acted on by complainant to his damage; and,

"Sixthly, That in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true."

The case before us fulfills all of these six conditions.

First. The defendant has made a representation in regard to a material fact. The extent of the interlock with the older Rutter and Etting patent is as material a fact as one can imagine. The Rutter and Etting title being the older, is, presumably, the better title.

Much reliance is placed by Reeder upon Ferguson's opinion, that even as to the interlock the Dillon title must be good because the Rutter and Etting was forfeited before 1837, and at that time the taxes on the Dillion had been paid. On this account Reeder and Watts drew the conclusion that it is immaterial how large the interlock is, and no misrepresentation or concealment in regard to such an immaterial fact can affect the rights of the parties under the contract. This view cannot be sustained, for the large extent of this interlock was a most

material fact in this negotiation and contract. Believing it to be small and inconsiderable Clark did not care to raise any question about it, for he wanted the land and was willing to run the risk of the Rutter and Etting title, except so far as the Rutter and Etting claimants could be shown by the surveyor to be in possession, for these, if their title was good, could be excluded from the operation of the contract as claims better than Reeder's title "by reason of adverse title and possession." A very different case, however, is presented when it appears that these claims cover almost all of the Dillon. Their title is the older one, and Ferguson's opinion in regard to the forfeiture of the Rutter and Etting and the payment of the taxes at that time by the Dillon and that for that reason the title of the Dillon became good and valid, is very brief and evidently not carefully considered, because thought to be of little importance. In fact, this part of the opinion is very ill-considered and sets forth an erroneous view of the law. In Virginia until March 22d, 1842, a junior patentee in order to take advantage of the forfeiture of an older patent must show that he was an actual occupant and in possession.

In *Wild* vs. *Serpell*, 10 Gratt. 405, the plaintiff, claiming under a junior patent, contended that he was entitled to the benefit of the forfeiture of the senior patent. The Court discussed the statutes prior to the Act of March 22d, 1842, on this subject, and found that the junior, in order to entitle him to the benefit of the forfeiture, must prove that he has had actual possession. The Court, continuing, said:

"But I think the Act of March 22d, 1842, Sess. Acts 1841-2, page 13, fully covers the case. By the third section of that Act the title to forfeited lands is transferred to and vested in such persons (other than those for whose default the same may have been forfeited) as had title or claim legal or equitable derived under a grant from the Commonwealth bearing date prior to the 1st of January, 1843, without making actual occupancy or possession of the land any part of the condition on which the transfer of title takes effect; and the qualification of a *bona fide* claim of title is in like manner omitted."

See, also, *Halstead* vs. *Buster*, 140 U. S. 273.

There is no evidence of any such possession under the Dillon title at the time of the forfeiture, or in fact until long after the

sale of the Rutter and Etting by the Commissioner of Forfeited and Delinquent Lands in 1840, and therefore the good title to these lands did not pass to the Dillon heirs by reason of the forfeiture of the Rutter and Etting as certified by Judge Ferguson, but was transferred to the purchasers at Commissioner Beckley's sale. In this view of the case, the extent of this interlock becomes a most material consideration.

Nor is it any answer to say that Clark knew Reeder had only a title by possession under an invalid tax deed and therefore adverse claims of title including the Rutter and Etting which may be a good paper title, are immaterial, for Clark and Ferguson were considering Reeder's possession under his tax deed to determine whether his title had matured against the Dillon heirs, in whose names the land was sold for taxes and bought by Reeder's predecessor in title. If they had known that the Rutter and Etting claimants were the real owners of the land and that these were the claims to be barred by Reeder's possession, a very different case would have been presented, for the Rutter and Etting title was sold by Commissioner Beckley to a large number of people, and has become very much subdivided and complicated, as appears by Miller's reports (Record, page 201), and in order to mature a title against all of these claimants by adverse possession it would be necessary to establish possession within the limits of each particular claim. This would require several hundred tenants located all over the property, and it has never been contended that Reeder ever had any such extensive possession.

It is therefore clear that the extent of the interlock was a material fact. The fact, however, must not only be material, but there must be a representation in regard to it. It is said that if the representation is only an expression of opinion the purchaser has no right to relief, although the opinion may be entirely erroneous. This principle has no application when the party expressing the opinion knows or has good reason to believe that the opinion is erroneous. A party expressing such a false opinion without disclosing his full knowledge is guilty of a fraudulent misrepresentation.

In Story's Equity Jurisp. (13th Ed.), Vol. I, on page 206, we find a note in which is discussed the liability in damages for false representations. This note contains the following:

"In the second case, where the opinion relates to a fact capable of being known, there can be no liability, provided no fact is known to the speaker to make the opinion false. If a fact of the kind is known to him, the 'opinion' is no opinion at all, but a fraudulent disguise intended to prevent liability. If still there is clear indication that it was intended to be acted upon, acting upon it will, it seems, create liability, at least if it was of a nature to induce belief and action in the average man. Where this is true, however, it is true, not because opinion amounts to a representation within the rule of liability, but because the opinion implies—that is, states by inference—the non-existence of the fact which makes the statement false. In other words, the liability rests as in other cases on misrepresentation of fact—of something capable of carrying conviction. Thus if a person, intending to deceive, should state that in his opinion a certain piece of land was a good dairy tract, that would by clear inference imply as that he knew of nothing to make the statement false; and if at the time he knew that something poisonous to cattle grew with the grass there, he has made a false representation and incurred liability. It seems to be enough, notwithstanding the fact that the statement is put in the form of an opinion, that with the scienter there was an actual intent that it should take effect: *Birdsey* vs. *Butterfield*, 34 Wis. 52; *Pike* vs. *Fay*, 101 Mass. 134, 137; *Picard* vs. *McCormick*, 11 Mich. 68; *Kost* vs. *Bender*, 25 Mich. 515. See, also, *Haygarth* vs. *Wearing*, L. R. 12 Eq. 320; *Hubbell* vs. *Meigs*, 50 N. Y. 480; *Wakeman* vs. *Dalley*, 51 N. Y. 27; *Holbrook* vs. *Conner*, Ib. 578; *infra*, § 198."

The representation of Reeder and Watts that the interlock was small and inconsiderable appears on its face as a matter of opinion merely, but since it has been proved that they knew the interlock was large and very extensive, this opinion becomes a fraudulent misrepresentation. This fraudulent misrepresentation is implied from the false opinion; but in this case we do not have to rest solely upon any such implied fraudulent misrepresentations, for Watts made the same fraudulent misrepresentations directly and expressly when he told Bell and Ferguson that he did not know, had no means of knowing, and had not been able to learn the extent of the interlock, that he had no knowledge or accurate information upon which to rely as to its extent.

A misrepresentation may be made by act, word, or conduct.

The fraud in this case was the creation of an impression in the minds of the purchaser and his agents in regard to a material fact, by the words and acts of the vendor and his agent, which they knew was false, but which they nevertheless purposely created with intent to deceive and mislead, and they knew that this impression was the basis upon which the purchaser made the contract. As was said by Jarvis, C. J., in *Keates* vs. *Codogan*, 3 Eng. 318, this was "positive, aggressive" deceit, "equivalent to an express misrepresentation."

Second. The representation of Watts and of Reeder in regard to the extent of the interlock was false, and false to their knowledge when made.

Third. Both Reeder and Watts not only did not believe that their representations were true, but on the contrary they knew that they were false.

Fourth. There is no doubt about the intent to deceive. There could have been no other purpose, and the benefits of the contract to them (and particularly to Watts, for to him it meant a $10,000 commission), which a disclosure would have lost to them, show clearly the *quo animo*.

Fifth. The plaintiff acted upon this fraudulent misrepresentation. He did not investigate for himself. Ferguson thought it sufficiently important to insert a paragraph in his certificate in regard to it, and it is clear that in making his certificate he relied upon what Watts told him. Ferguson testifies that he relied upon the representations of Watts in regard to the extent of the interlock, and if he had known the facts he would have provided for a full investigation before he would have allowed Clark to be bound by the contract. But as the basis upon which Clark made the contract was that the interlock was small and inconsiderable, and this was a material consideration, the law presumes that this basis was acted upon. There was no independent investigation by Clark at all. He simply acted upon the statements and representations of Reeder and Watts. The plaintiff and his agents, Ferguson and Bell, did not rely upon the representations of Reeder and Watts in regard to the extent of the interlock, in the sense that they took

for true and as satisfactorily proven that the interlock was small and inconsiderable simply because Reeder and Watts said so. They did rely upon it, however, in another sense—that is, as a representation that Watts and Reeder knew nothing which led them to believe or think that the interlock was more than small and inconsiderable. They did rely and act upon the express and direct representations made by Watts to the effect that he knew nothing and had no means of knowledge in regard to the extent of the interlock, and had no accurate information on the subject.

It is said that the representation must be one upon which the purchaser has the right to rely. Another way of putting this idea is that the law will not assist one who does not use the means of information which are readily available, but blindly rests upon the statements and opinions of others.

In *Conybeare* vs. *New Brunswick Co.*, 1 DeG. F. & J. 596, Turner, L. J., discussed the following quotation from 2 Swa. 287: "It was in this case laid down that if one party makes a representation which he knows to be false, but the falsity of which the other party had no means of knowing, the Court will rescind the contract." Turner, L. J., said: "Now I think it is not going too far to say that when it is said 'which the other party had no means of knowing' it is meant, had no sufficient means of knowing. That I think is the sense in which the words 'means of knowledge' are used in the passage to which I have referred."

It would have taken much time and money to have ascertained the facts in regard to the interlock between these two tracts, for it could not be done without an actual survey. The records in the land office and offices of the county clerks give of themselves little or no information on the subject. The lines have to be laid down on the ground by the surveyor before the facts in regard to an interlock can be known or appreciated. The descriptions are usually indefinite and hard to trace, and, in fact, sometimes too indefinite even for the surveyor. The means of acquiring definite information on the subject of the interlock were not readily available. As was said in *Camp* vs. *Camp*, 2 Ala. 632 (*supra*), the law will not re-

lieve against "careless indifference to the ordinary and accessible means of information," but "does not exact extraordinary diligence." These are the words of Chancellor Kent in the second volume of his Commentaries, p. 484. This is approved in *Smith* vs. *Richards*, 13 Peters, 26.

This, however, does not fully meet the point, for the opinion of Reeder and Watts in regard to the extent of this interlock was given as an opinion resting upon no very satisfactory basis, but almost in the nature of a guess. The question suggested is whether such an opinion does more than put the purchaser upon inquiry. This might be the result if the means of information were readily available, but, as shown above, they were not: *Baker* vs. *Seahorn*, 1 Swan, 154. The vendor must disclose a latent defect (*supra*, p. 27). Such a result under any circumstances in a case like this, where the vendor has obtained his ends by falsehood and fraud, would be a travesty upon justice. But there was no uncertainty and no guess about the representation of fact implied from the opinion, to wit: that Watts knew of no fact inconsistent therewith, nor had any good reason to believe that the opinion was erroneous. When Reeder and Watts gave it as their opinion that the interlock was small and inconsiderable, they made a representation that they knew of nothing to the contrary, nor had any reason to believe that this opinion was erroneous. This representation was not only made indirectly as the legal result of the false opinion, but, as explained above, directly and expressly by Watts when he told Bell and Ferguson that he did not know, had no means of knowing, and had not been able to learn the extent of the interlock, that he had no knowledge or accurate information upon which to rely as to its extent. These were representations of a fact, want of knowledge or information, and not matters of opinion. The plaintiff relied and acted upon these representations, and he had the right to rely and act upon them.

If Watts had kept silent and said nothing about the title, he and Reeder would have been in a much stronger position, although silence alone has been held to be fraud when it operates as concealment of a defect of title, and many cases have

held that the vendor must disclose such defects to the vendee (*supra*, p.). This certainly seems just and right, unless the means of information are equally open to both parties and the vendee has been negligent in not availing himself of them; but in this case Watts invited the confidence of the purchaser. He told Bell and Ferguson that there was an interlock, that the Rutter and Etting was the older patent; that he had no means of knowing the extent of the interlock nor any accurate information on the subject; that he had an impression, however, that it embraced some 5,000 or 6,000 acres; that some one from Pennsylvania was claiming a part of the interlock under the Rutter and Etting title and had a tenant, William Workman, there; that he had an impression that Workman and Mrs. Neall at the head of Pond Fork of Little Coal lived on the interlock; that the interlock was small and inconsiderable and covered only a small portion of the Dillon; that he called upon Reeder to inquire if he knew the extent of the interlock and was informed he did not; that he wrote McGinnis asking the same question, and he gives McGinnis's answer, and particularly that he wanted to give all the information he had and to keep nothing back and to conceal nothing. Everything he said about this matter was an invitation to the purchaser to place his confidence in him, and placed him (Watts) under a duty to disclose all he knew (*supra*, p. 33). These were statements and representations of the vendor's agent, who in 1873, and presumably for quite a period at that time, lived in the immediate neighborhood of the land. Surely he must be presumed to have the best information on the subject, and the purchaser was entitled to rely on what he said. The purchaser had no other source of information and he made no independent investigation.

Sixth. The complainant was ignorant of the falsity of the representations in two senses; first, as a fact; and second, as a statement known to be false by the party making it. The complainant believed that the statement was true in both senses.

THE OPINION OF THE CIRCUIT COURT.

The opinion of the Circuit Court was rendered by Mr. Justice Harlan. It appears on pages 449 to 455 of the Record. He falls into an error on page 451, where he states that it is very doubtful whether there is any "direct, positive averment of fraud or false representations by Watts." He evidently failed to notice the amendment to the second amended and supplemental bill. This amendment appears at page 87 of the Record, and is about as direct and positive an averment of fraud as can be written. When the earlier bills were filed Clark had no knowledge of the fraud or reason to believe that there was any. Mr. Justice Harlan says (Record, p. 451):

"In the view, however, which I take of the case, it may be assumed that the plaintiff's pleadings sufficiently charge fraud; and it may also be conceded that if it were satisfactorily proven that Watts made representations in respect to the interlock of the Rutter-Etting survey and the Dillon survey that were false and of a material character the plaintiff would be entitled to a rescission. We are, however, of opinion that the evidence upon that issue does not justify a decree rescinding the contract."

It is satisfactorily proven [indeed admitted] that Watts and Reeder both knew the full extent of the interlock, and not only concealed it, but Watts falsely represented to Ferguson and to Bell that it was small and inconsiderable, and Watts himself swears that he made all kinds of representations about this interlock except the one most important and material one, that it covered almost all of the Dillon; and although he concealed this, he swears he told all he knew, and he represented and swore that he had no knowledge or means of knowledge in regard to the extent of the interlock. These representations were "false," and known by Watts to be false at the time he made them, and they were also "of a material character." Surely the conclusion of Mr. Justice Harlan is erroneous. He says (Record, page 451):

"Looking at all the evidence I am of opinion that the charge of fraud—assuming fraud to be sufficiently averred—is not sustained by such evidence as will justify the Court in basing a decree upon that charge or in determining the rights of the parties upon any basis except that furnished by the written

documents and such uncontradicted facts as are competent in connection with those documents."

Evidently the effect of the testimony had not been made clear to the mind of the Court.

Mr. Justice Harlan, in the paragraph at the top of page 452, says:

"But the interlock, however serious, does not of itself or by itself entitle the plaintiff to a decree setting aside the contract."

Also,

"It is perfectly consistent with the allegations of the plaintiff's pleadings that no single acre of the Dillon survey is held by a better right than Reeder's 'by reason of adverse title and possession.'"

And again,

"There is no distinct averment in the plaintiff's pleadings that he will lose any of the land 'by reason of adverse title and possession in others.' He avers that there are claimants to lands within the Dillon survey adversely to Reeder, but he does not allege that they are in possession claiming under the Rutter-Etting survey and have the better title."

The language of the learned judge would indicate that Clark must not only show the existence and extent of the conflict with the older Rutter and Etting patent, but that he must go further and prove that there are parties who are in possession claiming under the Rutter and Etting survey and that they have the better title. This shows a misunderstanding of the plaintiff's case. The plaintiff does not ask for a rescission because the Rutter and Etting claims are within the class excepted from the operation of the contract, to wit, claims "held by a better title than that of the said Reeder by reason of the adverse title and possession." This would be no ground for rescission, but rather for an abatement of the purchase-price, and to entitle Clark to this he would of course have to show that the Rutter and Etting claimants were within the class excluded. But the ground upon which rescission is asked is fraudulent misrepresentations and concealment of material facts, to wit, the existence and extent of the interlock. This point is not touched by this paragraph of the opinion, nor in fact is it more than suggested by any

other paragraph. At the bottom of page 452 we find the following:

"Can it be a sufficient ground to set aside the contract for the plaintiff to show that a large part of the lands in question are within the lines of a patent older than the one under which Reeder claims and that they are claimed adversely to Reeder, especially when Reeder only agreed to convey with special warranty and when the plaintiff agreed to pay for all the lands covered by the Sarver survey, except such as were shown by a survey had, at his expense, to be held 'by adverse title and possession,' constituting a better title than Reeder's? I think not."

If neither party knew of the existence of the older patent, or if both parties thought the interlock was small, whereas it turned out to be very large, there would be such a mutual mistake in regard to a material fact as to warrant a rescission; and where, as in this case, fraudulent misrepresentations and concealment in regard to the existence and the extent of the older patent are proved, it is hardly open to doubt that a court of equity should relieve the purchaser. As was said by Sir William Grant: "If he (the vendor) knows and conceals a fact material to the validity of the title, he was not aware of any principle on which relief could be refused to a purchaser." (See quotation from Sugden on Vendors, *supra*, p. 24.)

Mr. Justice Harlan then speaks of Ferguson's knowledge of the existence of the interlock at the time he wrote his opinion, and says: "I am satisfied that no one connected with this business knew the full extent of the interlock" (Record, page 453); and yet the gist of the plaintiff's case is that both Reeder and Watts did know the full extent of the interlock, and had known it for years, and misrepresented it and concealed their information on the subject. Surely this shows a misunderstanding of the case in the Circuit Court. Again (Record, page 453):

"If Mr. Watts believed, and so said to him (Ferguson) at the time of the investigation of the title, that the Rutter-Etting patent covered less than ten thousand acres of land, it is impossible to suppose that Mr. Ferguson, with all his experience as a lawyer, especially in connection with land titles, relied upon any such expression of belief or any such statement."

Watts did not believe any such thing, and this is the plaintiff's

chief cause of complaint. A representation of this kind made honestly and without knowledge or reason to believe that it is untrue may be a matter of opinion only upon which the other party has no right to rely and claim relief if it turns out to be untrue, but when the party making such a representation knows or has reason to believe that it is untrue it ceases to be a matter of opinion only, and becomes a fraudulent misrepresentation.

Again, on page 453, we find:

"The basis of the present suit is that the interlock between the Rutter and Etting survey and the Dillon survey is much greater than any one supposed."

On the contrary, the basis of this suit is the fraudulent misrepresentations and concealment by Reeder and Watts as to the existence and extent of the interlock. The opinion filed in the Circuit Court does not deal with this aspect of the case.

EFFECT OF REEDER'S AGREEMENT TO CONVEY WITH SPECIAL WARRANTY ONLY.

It would appear to have been the opinion of the Circuit Court that Reeder's agreement being to convey with special warranty only affected the plaintiff's right to rescind. According to our view of the case, this has no bearing upon the matter at all. It could only affect the plaintiff's rights after the deed with the covenant of special warranty inserted was executed, but this trade never progressed that far. It does signify that Reeder would not guarantee his title except against his own acts. This appears now as a sharp attempt on the part of Reeder and Watts to protect themselves after the deed should be executed and all the purchase-money paid against a suit by Clark to make them repay this purchase-money as soon as he discovered the Rutter and Etting interlock. They could not have succeeded, however, for if the fraud had not been discovered until after the execution of a deed with special warranty only, Clark would still have been entitled to rescind on account of the fraud. The only difference between the two warranties in such a case would be that a covenant of general warranty

would expressly give to Clark the right to sue for his purchase-money upon an eviction by the Rutter and Etting claimants, or by proving possession under the Rutter and Etting title, with the further proof that the Rutter and Etting title was the paramount title. A special warranty would not give Clark this right, but would have no effect upon his right in equity to rescind for fraud, or even for mutual mistake. This provision that the purchaser after the deed is made shall have the guarantee of the seller against his own acts only surely cannot protect the seller against the effect of fraudulent misrepresentations and concealment of material facts by himself and his agent. This is in no sense a suit upon the warranty; in fact, the warranty was never given, for the contract remains executory; the deed has never been executed.

Indeed, the fact that the purchaser is not to have the protection of a general warranty but of a special warranty only, although it may charge him with notice that the vendor does not consider his title sufficiently clear and undisputed to make him willing to guarantee it; on the other hand, it makes it even more incumbent, if possible, upon the vendor to deal fairly, disclose all he knows, and conceal nothing. The agreement to convey with special warranty only is of itself a reason in favor of granting a rescission of the contract, for if the decree of the Circuit Court is affirmed and Clark is made to take this doubtful and unmarketable title, he will not even have the protection of a covenant of warranty. This would be a manifest injustice to him. Therefore, the agreement to convey with special warrantly only instead of being an argument in favor of specific performance is really an argument for rescission.

FERGUSON'S CERTIFICATE.

Counsel for Reeder claim that the contract appointed Ferguson an arbitrator on the question of title, and that his opinion was binding upon both parties, and prevents Clark from objecting to a completion of the contract on account of any question

in regard to the title. This shows a misunderstanding of the part which Ferguson's certificate plays in this case. It is proved that Clark would not buy the land until Ferguson could examine Reeder's title. This was agreed upon, and thirty days were given to Ferguson to make his investigations and give his opinion. This was a precaution taken by Clark, for he knew Reeder's title was only a tax title, and such titles in West Virginia do not bear a very good reputation. He wanted an examination of Reeder's title for his own protection before he would agree to be bound by the contract. Ferguson's opinion was favorable, and thereupon the contract became fully operative. There is no doubt that the principal reason for securing Ferguson's certificate as to the title was that it was only a tax title, although, presumably, it was expected that Ferguson should report upon any questions in regard to the title that he might discover. Clark is chargeable with notice of all facts which came to Ferguson's attention in the preparation of his opinion, but certainly Ferguson's failure to discover anything which he considered rendered Reeder's title defective and his favorable report upon the title can hardly operate to relieve Watts and Reeder from the effect of their fraudulent misrepresentations and concealment of material facts. Watts told Ferguson there was an interlock between the two surveys, and fraudulently misrepresented to him that it covered only a small portion of the Dillon when he knew the contrary. He also told him that he did not know the extent of the interlock, and had no means of knowing it, when, as a matter of fact, he did know all about it from actual survey. Ferguson believed him, and relied upon these representations, and reported as a fact, from the best information he could secure, that the interlock covered only a small portion of the Dillon. He was misled and deceived by Watts. It is a strange result indeed if Ferguson's certificate, procured by such means, can relieve Watts and his principal, Reeder, from the ordinary effects of such fraud and deceit.

THE AGENCY OF WATTS.

Reeder seems to deny any responsibility for representations made by Watts or for any of his acts or conduct in the negotiation of this business. We believe he even goes so far as to deny that Watts was his agent. Clark does not claim that Watts was Reeder's agent at the time the written agreement was signed, but that he made the contract "as the agent of Reeder," and Reeder, by his acceptance and approval of the contract, accepted Watts as his agent and became responsible for everything that Watts had said and done in the negotiation of the contract. He was, of course, responsible for everything said and done by Watts after the contract was accepted and approved. It is well established that a principal accepting and ratifying a contract made by another in his name or on his behalf becomes responsible for the acts and conduct of the other in procuring the contract, at least in equity where specific performance or rescission is asked, although not always for damages at law; and this although the principal may have had no knowledge of such acts and conduct. The following authorities sustain this proposition:

Law vs. *Grant*, 37 Wis. 548;
Griswold vs. *Gebbie*, 126 Pa. 353;
Wachter vs. *Phœnix Assurance Co.*, 132 Pa. 428;
Peek vs. *Derry*, L. R. 14 App. Cases, 337;
Western Bank of Scotland vs. *Addie*, L. R. 1 Scotch & Div. App. 145;
New Brunswick & Canada R. & L. Co. vs. *Conybeare*, 9 H. of L. Cases, 711;
Houldsworth vs. *Glascow Bank*, L. R. 5 App. Cases, 317;
Arkwright vs. *Newbold*, 17 Ch. Div. 301;
Murray vs. *Mann*, 2 Exch. 540;
Mullen vs. *Miller*, 22 Ch. Div. 194;
Veazie vs. *Williams*, 8 Howard, 134;
Crump vs. *U. S. Mining Co.*, 7 Grat. 352.

There is no doubt about the fact that Watts must be considered the agent of Reeder, and that Reeder is responsible for his acts and representations. On this point Mr. Justice Harlan says (Record, pages 450–1):

"I am of opinion that the rights of the parties must be determined upon the theory that, at the date of the contract, Watts had authority, as agent for

Reeder, to negotiate for the sale of the lands, though any sale, or agreement to sell that he would make, was to be subject to the approval of his principal. It is true that at the signing of the contract Watts did not, in fact, have authority, as agent for Reeder, to enter into an agreement for the sale of the lands. He had only an optional right for himself, for a limited period and upon certain conditions, to buy the lands. But, in making the contract of February 29th, 1884, he assumed to act, not only for himself, under his written agreement with Reeder, but as the agent of the latter, and it was so stated in the contract. When, therefore, Reeder approved the contract in question, without qualification, he must be held, as between himself and Clark, to have assented to Watts' assumption of agency. It does not appear that he was informed of what passed between Watts and Bell, at or before the contract was signed by them, but he was at liberty to inquire as to such matters, or when approving the contract to disclaim the agency of Watts, as well as responsibility for what the latter may have said to Bell or others in respect to the lands. His unqualified approval of the contract was equivalent, so far as the question of agency was concerned, to original authority to Watts to make a sale of the lands, subject to his approval as to terms. If, when the contract of February 29th, 1884, was signed, Watts was guilty of any fraud or made any false representations that would entitle Clark to a rescission (had he been in fact an agent to sell), Reeder, in taking the benefit of the contract, which, on its face, recites Watts' agency, cannot escape responsibility for such fraud or representations, upon the ground that Watts was not agent or because he did not have personal knowledge of what passed between Watts and Bell."

REEDER'S CROSS-BILL FOR SPECIFIC PERFORMANCE.

Referring again to Mr. Justice Harlan's opinion, we find (Record, page 455) the following:

"The next question to be considered is, whether Reeder is entitled to the relief asked in his cross-bill, namely, a decree for a sale of the lands in question to raise such sum as may be due him as to the balance of the purchase-money. If the views already expressed are sound, a decree in favor of the defendant, Reeder, on his cross-bill will necessarily follow."

This is certainly not right. Even though Clark might not be entitled to a rescission, it does not follow that Reeder is entitled to specific performance. In *Thompson* vs. *Jackson*, 3 Rand. 504, the syllabus reads:

"A court of equity will refuse to rescind a contract in many cases where it would also refuse to decree specific performance."

In re Banister, 12 Chanc. Div. 131, Jessel, M. R., at page 142, says:

"I apprehend that the considerations which induce a Court to rescind any contract, and the considerations which induce a court of equity to decline to enforce specific performance of a contract, are by no means the same. It may well be that there is not sufficient to induce the Court to rescind the contract but sufficient to prevent the Court enforcing it."

See, also,

Fry on Specific Performance, p. 253.

Whatever the rights of Clark, the purchaser, may be, Reeder, the vendor, is clearly not entitled to specific performance. He comes not with clean hands into this court of equity. It is proven against him that he and his agent have concealed what they ought to have told, and they have told that which they knew was false, and have procured their contract by such means. A defect in the vendor's title, irrespective of fraudulent misrepresentations, is sufficient to prevent specific performance. The purchaser is entitled to a marketable title.

In Sugden on Vendors, Vol. I, Chap. 10, § 3, p. 577, we find:

"A court of equity is anxious to protect a purchaser and give to him reasonable security for his title, not compelling him to take a title without knowing whether it is good or bad. The inclination of the Court is in favor of the vendee, and a vendor claiming to be exempt from the general rule is required clearly to establish a case of exception.

"To enable equity to enforce a specific performance against a purchaser, the title to the estate ought, like Cæsar's wife, to be free even from suspicion, for it would be an extraordinary proceeding for a court of equity to compel a purchaser to take an estate which it cannot warrant to him. It is, therefore, becoming a settled and invariable rule that a purchaser shall not be compelled to accept a doubtful title, and the Court will not have regard to its own opinion only, but will take into account what the opinions of other competent persons may be."

In *Swayne* vs. *Lyon*, 67 Penna. 436, Chief Justice Sharswood said:

"The vendee has the right not merely to have conveyed to him a good but an indubitable title. Only such a title is deemed marketable. It has been held that a title is not marketable where it exposes the party holding it to litigation."

In *Jeffries* vs. *Jeffries*, 117 Mass. 184, the Court said:

"The defendant in proceedings for specific performance shall not be compelled to accept a title in the least degree doubtful. It is not necessary that he should satisfy the Court that the title is defective so that he ought to prevail at law; it is enough if it appears to be subject to adverse claims which are of such a nature as may reasonably be expected to expose the purchaser to controversy to maintain his title or rights incident to it. He ought not to be subjected against his agreement or consent to the necessity of litigation to remove even that which is only a cloud upon his title."

The following are to the same effect:

Hepburn vs. *Auld*, 5 Cranch, 262;
Watts vs. *Waddle*, 6 Peters, 389;
Linkous vs. *Cooper*, 2 W. Va. 67;
Middleton vs. *Selby*, 19 W. Va. 167;
Boggs vs. *Bodkin*, 32 W. Va. 566;
Christian vs. *Cabell*, 22 Gratt. 82;
Am. and Eng. Ency. of Law, Vol. XXII, p. 948, and cases cited;
Beach on Modern Eq. Jurisp., Vol. II. Sec. 606.

In fact, equity will enjoin the collection of purchase-money on land on the ground of defect of title after the vendee has taken possession under a conveyance from the vendor with general warranty if the title is questioned by a suit either prosecuted or threatened, or if the purchaser can show clearly that the title is defective.

Kinports vs. *Rawson*, 2 So. E. Rep. 85;
Yancy vs. *Lewis*, 4 Henning & Mun. 390;
Ralston vs. *Miller*, 3 Rand. 44;
Lovell vs. *Chilton*, 2 W. Va. 410;
Clark vs. *Hardgrove*, 7 Gratt. 399;
Korger vs. *Kane*, 5 Leigh, 657;
Griffin vs. *Cunningham*, 19 Gratt. 571;
Wamsley vs. *Stalnaker*, 24 W. Va. 214;
Heavner vs. *Morgan*, 4 So. E. Rep. 406;
Smith vs. *Parsons*, 11 So. E. Rep. 68;
Kinports vs. *Rawson*, 15 So. E. Rep. 66.

The above cases establish that the burden is upon the vendor to show that he has a good title, and not upon the vendee to prove the defects. Throughout this case, however, Clark has been made to take the burden of proving that Reeder's title is defective. The surveying to determine the divisions of the

Rutter and Etting and the facts and figures in regard to the conflict was ordered to be done if Clark wanted it and agreed to pay for it. The receiver was authorized to bring actions of ejectment against the adverse claimants, at Clark's expense. The theory of the Circuit Court was that Clark must prove the validity of the Rutter and Etting claims against Reeder or he must take the land. This has put Clark in a very awkward position. The Rutter and Etting claimants were not parties to the suit and could not properly be made parties, and therefore would not be bound by the decrees, and yet Clark was made to fight their battles without having the knowledge of their titles which presumably they have of their own. He has been obliged to contest the validity of the title which, unless he could show that it was invalid, the Court proposed to make him take, and if he has failed, and the decree of the Circuit Court is confirmed, he will have to make the same fight over again against the owners of the Rutter and Etting title, and he will have to fight them to sustain the validity of the title which in this case he has been made to attack. Clark should not have been put in this position. This question, however, as to the burden of proof is entirely distinct from the main issue in the case, to wit: Clark's right to rescission for fraudulent misrepresentations and concealment of material facts.

RESCISSION IS THE PROPER REMEDY.

There can be no question that Reeder's title is not a marketable title. The paper title is outstanding in a large number of claimants, and although Reeder seems to have had possession of different parts of the tract, it is evident that his possession cannot avail him against the claimants of much the larger part of the property, for it does not appear that he has had possession within the limits of their respective claims. Therefore, the Circuit Court committed error in granting Reeder's prayer for specific performance.

If, instead of making Clark take the whole tract, they had

made him take the 7,000 acres only which lie outside of the Rutter and Etting, and the title to which appears to be good, there would have been some foundation of reason for the decision, although even that would not be right, for where the failure of title covers such a large part of the property as in this case, the vendee is entitled to a rescission *in toto*, and not an abatement simply, unless he asks for it and does not want to rescind.

There is another course adopted by courts of equity in cases of this kind when it seems to meet the ends of justice better than either rescission or specific performance or abatement, and that is to leave the parties to their remedies at law.

In Minor's Institutes, Vol. II, p. 900 (810), Professor Minor says:

> "Whether the Court will thus decree compensation, or leave the parties to their remedies at law, or will take the much more decisive step of rescinding the contract, depends on the exercise of a fair discretion as to which of those three courses will best attain the justice of the case."

Where there has been any laches on the part of him who seeks specific performance or rescission, which a court of equity alone can grant, or he does not come into equity with clean hands, the Court will not entertain him, but will dismiss his bill. In such cases there is good substantial reason for refusing relief. Justice can be better worked out in that way than in any other. But this course is never adopted unless it has more of justice to commend it than either rescission or specific performance or an abatement. In this case specific performance is out of the question, under all the authorities, and an abatement would not be a fair conclusion, for Clark ought not to be made to take a 7,000-acre tract when he contracted to buy a tract of 50,000 acres. There is no objection at all to rescission, for the plaintiff has in no sense been guilty of laches, and he comes with clean hands.

The parties can be put in *statu quo*, for if the contract is cancelled Reeder will have just what he had before the contract was made, just the same title, somewhat improved, indeed, by reason of the possession of his tenants during this litigation.

If, on the other hand, the parties are left to their remedies at law serious injustice will be done to Clark. He has paid his $35,000, and unless Reeder is made to repay it by means of a decree in this case Clark will be unable to recover it. It is too late to sue for it at law, for it has been more than ten years since it was paid, and the suit will be barred by the statute of limitations.

This question was considered in *Stearns* vs. *Beckham*, 31 Gratt. 379, and the Court said (page 426): "In the first place, if the appellants are compelled to bring a new suit for the recovery of the purchase-money they are liable to be defeated by the statute of limitations." The same reason for granting relief was given in *Bowles* vs. *Woodson*, 6 Gratt. 78.

Therefore, of the four courses suggested, it seems that rescission is the only appropriate one, not only because Clark has clearly made out a proper case for rescission on the ground of fraudulent misrepresentations and concealment of material facts, but also, and, in fact, entirely apart from the fraud, because specific performance is out of the question, as Reeder's title is not a marketable one, and because injustice, and not justice, would result from an abatement or from leaving the parties to their remedies at law.

We respectfully submit that the Circuit Court committed error, and that the decree appealed from should be reversed, and the contract rescinded and a judgment given against Reeder for the $35,000 paid under the contract, with interest.

JOSEPH S. CLARK,
RICHARD C. DALE,
Of Counsel for Appellant.

No. 264. October Session, 1894.

IN THE

Supreme Court of the United States

E. W. CLARK, Appellant,

vs.

CHARLES REECE, Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

IN THE

Supreme Court of the United States.

OF OCTOBER SESSIONS, 1894.

E. W. CLARK, Appellant,
vs.
CHARLES REEDER, Appellee. } No. 262.

Appeal from the Circuit Court of the United States for the District of West Virginia.

ADDITIONAL PAPER-BOOK FOR APPELLANT.

The appellant, by bill filed in the Court below, prayed a decree for the rescission of an executory contract for the purchase of a tract of about fifty thousand acres of land in the West Virginia mountains, charging in his original bill that the contract of purchase and sale had been entered into by the parties under a mutual mistake as to a fact having a material bearing upon the validity of the vendor's title, to wit, that an older patent, known in the record as the Rutter and Etting patent, covered over ninety per cent. of the tract known in the record as the Dillon tract, which the vendee agree to convey, and by an amended and supplemental bill filed after the appellant discovered that the fact of this interlock was known to the vendor's agent and falsely represented by him in the negotiations, charging fraud as a further ground of rescission.

The agent through whom Reeder, the vendor, made the sale was C. C. Watts. The fact of his agency and of Reeder's responsibility for any fraudulent or mistaken representations made by Watts are distinctly recognized in the opinion filed in the Circuit Court, Mr. Justice Harlan saying:

"I am of opinion that the rights of the parties must be determined upon the theory that at the date of the contract Watts had authority as agent for Reeder to negotiate for the sale of the lands, though any sale or agreement to sell that he would make was to be subject to the approval of his principal. It is true that at the signing of the contract Watts did not in fact have authority, as agent for Reeder, to enter into an agreement for the sale of the lands. He had only an optional right for himself, for a limited period and upon certain conditions, to buy the lands. But, in making the contract of February 29th, 1884, he assumed to act not only for himself under his written agreement with Reeder, but as the agent of the latter, and it was so stated in the contract. When, therefore, Reeder approved the contract in question without qualification he must be held, as between himself and Clark, to have assented to Watts' assumption of agency. It does not appear that he was informed of what passed between Watts and Bell at or before the contract was signed by them, but he was at liberty to inquire as to such matters, or when approving the contract to disclaim the agency of Watts as well as responsibility for what the latter may have said to Bell or others in respect to the lands. His unqualified approval of the contract was equivalent, so far as the question of agency was concerned, to original authority to Watts to make a sale of the lands, subject to his approval as to terms. If, when the contract of February 29th, 1884, was signed, Watts was guilty of any fraud or made any false representations that would entitle Clark to a rescission (had he been in fact an agent to sell) Reeder, in taking the benefit of the contract, which on its face recites Watts' agency, cannot escape responsibility for such fraud or representations upon the ground that Watts was not agent or because he did not have personal knowledge of what passed between Watts and Bell." (Record, page 450.)

What then was it encumbent upon Clark to establish to warrant a decree for the rescission of the contract?

(*a.*) A misrepresentation by Watts.

(*b.*) The materiality of such misrepresentation.

(*c.*) That the misrepresentation was relied on.

(*a.*) That a misrepresentation was made is clearly established by the pleadings and proofs. The fact that there is an interlock is not disputed. See Opinion of Mr. Justice Harlan.

Undoubtedly the Rutter-Etting patent is older than the Dillon patent. It is equally clear that the former covers most of the Dillon survey, though

the extent of the interlock is not made certain by the evidence. (Record, page 452.)

It also is not in dispute that Watts misstated the facts with reference to the extent of the interlock in the light of the now admitted fact that the Rutter-Etting patent covers most of the Dillon survey. It is enough to take the admission of Watts' answer as proof of his misrepresentation: Answer of Watts, page 93 of Record.

Respondent incidentally mentioned to the said Bell and Ferguson, while the contract was being drafted, that he had in some way gotten the impression—he did not know how or from whom—that the interlock between the Rutter and Etting and Dillon surveys embraced some 5,000 or 6,000 acres, but that he did not know what foundation there was for such impression or how he got it; that he neither knew or had been able to learn to what extent said interlock really prevailed, and the respondent did not then nor at any other time represent the quantity of acres contained in said interlock, nor did he then nor does he now know to what extent said interlock prevails (Record, page 93.)

That Watts was not ignorant of the extent of the interlock is established by the testimony of Reeder that as early as 1873 Watts had full information of the extent of the interlock and that at the time of the negotiations at Charleston in February, 1884, he had in his possession the document and plan which showed the extent of the interlock according to the survey which Reeder had made. See answer of Reeder, Record, pages 90 and 91.

I became the owner of the Dillon survey in the year 1870, and had it surveyed by William T. Sarver in the year 1873. Mr. Sarver pointed out the place where the south line of the Rutter and Etting survey crossed the west line of the Dillon. The same year I obtained certified copies of the original surveys and grants of both tracts, and from the description of the last line (east line) of the Rutter and Etting survey, crossing the head-waters of the Guyandotte, it did not seem probable that this survey ran entirely across the Dillon. Exactly how much land was included in the interlock I did not know, and I did not consider it important, as I had been advised by my counsel at Oceana that the prior survey of the Dillon tract would unquestionably hold good as against the Rutter and Etting. In 1883 I learned that one Iverson Bailey was holding, and had held for eight or nine years, a number of acres inside the Dillon lines under a lease from a party claiming title derived from the Rutter and Etting title. I brought suit against him in Wyoming County

and had him ejected. About the latter part of December, 1883, or the beginning of January, 1884, and before the contract of the 29th of February was made, I sent all my title papers to Charleston, W. Va., for examination, and, in order that it should be a full and thorough examination, the certified copies of both the Dillon, and Rutter and Etting surveys and grants were among the title papers so submitted; which fact is of itself evidence of my knowledge that there was a conflict or interference of the lines of these surveys, and my desire to put at the service and bring to the notice of the examiner all the knowledge I had on the subject.

Testimony of Charles Reeder, Record, page 435:

Thirteenth Cross-question. Mr. C. C. Watts says in his deposition in this case that he corresponded with you in the year 1873 in reference to the Rutter and Etting, and Dillon surveys. Have you any letters of said Watts in reference to that matter; and, if so, will you produce and file them as part of your cross-examination?

Answer. I think I have a letter from Mr. Watts expressly on that subject, acknowledging the receipt of the certified copies, and I will file them as part of my cross-examination. As requested by Judge Ferguson during my cross-examination, I here file, marked "Exhibit C. R. No. 1," the copy of the Rutter and Etting survey mentioned in my testimony; also the original letter from C. C. Watts in reference to my title to the Dillon survey, marked "Exhibit C. R. No. 2." I also file, marked "Exhibit C. R. No. 3," a copy of the sketch referred to in Mr. Watts' letter of November 8th, 1873, and an explanation of that sketch.

Letter, Watts to Reeder, page 442 of Record:

OCEANA, W. VA., November 8th, 1873.

C. REEDER, ESQ.

MY DEAR SIR:—Your favor, together with copies of "Duval survey and grants," "Dillon survey and grant," and "sketch of location," dated and postmarked October 24th, 1873, came to hand 30th of same month.

See, also, map showing the interlock, on page 445 of the Record.

These quotations from the pleadings and proofs establish the fraudulent misrepresentation of Watts. This conclusion is reached, not by giving credence to the disputed testimony of the plaintiff and plaintiff's witnesses, but simply by putting together the admissions of the defendant, Reeder, and his agent, Watts.

Reeder produces a survey and plat made by his surveyor in 1873, which shows the interlock, which plat and survey was

given by Reeder to Watts in 1873, and again sent by Reeder to Watts in January, 1884, as Reeder says, "in order that there should be full and thorough examination, . . . which fact is of itself evidence of my knowledge that there was a conflict or interference of the lines of these surveys."

And yet Watts, having these papers which showed the exact interlock, in his answer gives this version of his statement made to Bell while the contract was being drafted.

> "That he [Watts] had in some way gotten the impression he did not know how or from whom that the interlock between the Rutter and Etting and Dillon surveys embraced some 5,000 or 6,000 acres, but that he did not know what foundation there was for such impression or how he got it; that he neither knew or had been able to learn to what extent said interlock really prevailed."

It will thus be seen that Watts admits that he did undertake to make a representation upon the subject of the interlock, and Reeder's answer shows not only that the representation was untrue in fact, but also that it was not in accordance with the information which Watts then had, by his possession of the plats and surveys, which Reeder had sent him in order that the purchaser might have full and true information. While this view may exculpate Reeder from personal moral delinquency, it does not relieve him from liability to a decree for a rescission. For the purposes of this case Reeder is answerable for the fraud of Watts, his agent, whose contract, obtained by fraud, Reeder ratified, and is now seeking to enforce.

(*b.*) Were Watts' untrue or erroneous statements material to the subject of the contract so as to warrant a decree for a rescission?

The Circuit Court seems to have held that the misrepresentations were not material, and were misled into so ruling by applying as a test of their materiality, a clause in the contract which was designed to cover something which has no relation to the question.

Mr. Justice Harlan says in the opinion on page 452 of the Record:

But the interlock, however serious, does not of itself or by itself entitle the plaintiff to a decree setting aside the contract. Every foot of the Dillon survey might be covered by the Rutter-Etting patent, and yet Reeder's title, under the Dillon patent and survey, to the lands in question may be better in law than any other. The parties agreed to take the exterior boundaries of the Dillon survey as ascertained by Sarver, and Clark was given the right, by a survey at his own expense, to ascertain what lands within those boundaries were held by a better title than Reeder's "by reason of adverse title and possession." Now, it is perfectly consistent with the allegations of plaintiff's pleadings that no single acre in the Dillon survey is held by a better right than Reeder's "by reason of adverse title and possession." If Reeder and those claiming under him are in possession with a better right in law than any one not in possession, but simply claiming under the Rutter-Etting patent, then it is immaterial, under the contract, that the Rutter-Etting patent is older than the Dillon patent. I repeat, there is no distinct averment in the plaintiff's pleadings that he will lose any of the land "by reason of adverse title and possession" in others. He avers that there are claimants to lands within the Dillon survey adversely to Reeder, but he does not allege that they are in possession claiming under the Rutter-Etting survey and have the better title.

It will thus be perceived that Mr. Justice Harlan adopted as the test of materiality, not whether the Rutter and Etting title was in fact a better title, or what we submit is a true test in this case, which is in effect a bill for specific performance, whether the Rutter and Etting title has such semblance of validity as to render Reeder's title the subject of just doubt, but held that in order that the misrepresentation should be material under the contract, it was necessary to show that there were parties *in possession* under the Rutter and Etting title who, by reason of adverse title and possession, held by a better title. In order that the error of the Circuit Court may be clearly understood it is important to point out just what the purpose of this clause of the contract referred to by the Court was. The clause of the contract is as follows (page 6 of the Record):

It is understood that the party of the second part is satisfied with the survey already made by William T. Sarver of the interior bounds of said tract of land, and that the surveying to be done is only such as may become necessary to ascertain what lands within said boundary are held by a better title than that of the said Reeder by reason of adverse title and possession, all of which surveying is to be done at the expense of said party of the second part.

The circumstances under which this clause was introduced and its scope is very clearly stated in the answer of Watts, on page 74 of the Record:

> Thirteenth. That the said Ferguson, at the instance of the said Bell and with the assent of the respondent, drafted and prepared the said contract of sale; that when the first draft of said contract was shown to respondent he observed that the contract, after stating that "it is understood that the party of the second part is satisfied with the survey already made by W. T. Sarver of the interior bounds of said tract of land," did not in the next clause or elsewhere provide for or use the following language: "By reason of adverse title and possession," but, as respondent now recollects, said contract proceeded after the word land, above quoted, as follows: "And the surveying to be done is only such as may become necessary to ascertain what lands within said boundary are held by a better title than that of the said Reeder," and the respondent immediately refused to proceed any further with the negotiations, stating that under that provision there would be no end to the surveying; that all conflicting claims, and among them that of 10,000 acres set up by the person from Pennsylvania whose name, as aforesaid, is not now remembered, could and would be surveyed out, whereas respondent's contract for surveying was limited to claims set up by parties on the land, holding and claiming adversely to said Reeder, and only as such lands so claimed and occupied.
>
> Thereupon, at respondent's requirement, the draft of said contract was so altered by the said Ferguson as to add after the last above quoted clause the following: "By reason of adverse title and possession."

It will thus be perceived that it was the purpose of the parties that when the question of the vendor's title to the tract as a whole was satisfactorily determined, that the parties, by this clause of the contract, recognized that there were certain persons on the land holding titles, originally bad, which by possession of their actual holdings had become good, these holdings, by adverse title and possession, were to be determined by survey, and the amount of these holdings were to be deducted from the acreage for which the vendee was to pay.

The Circuit Court, however, as appears from its opinion, has taken the language of this clause of the contract, phrased to meet a particular and exceptional case, as a definition of what is encumbent upon a vendee to show as a condition precedent to obtaining a decree for the rescission of executory contract for the sale of lands, the making of which contract was induced by

the misrepresentation of the vendor as to the status of an adverse outstanding title.

We submit that the Circuit Court was misled by the consideration of this clause of the contract into applying an erroneous test in determining the question of the materiality of the misrepresentations as to the extent of the interlock.

And considering the case without reference to this clause of the contract, which we have shown has no bearing upon the issue before the Court, we submit that the existence of an older patent for a larger portion of the tract which the vendor undertakes to convey is a most material fact, because the existence of such older patent, *prima facie* is evidence that as to that portion of the tract within the interlock the vendor has no title to convey.

The case of *Hollingsworth* vs. *Sherman*, 81 Virginia, 668, recently decided in the Court of Appeals of Virginia, shows that the holders of original patents are a class of adverse claimants most dangerous to these holdings under tax titles or junior patents.

Before passing from the consideration of the materiality of the misrepresentation, it may be well to notice the distinction between the materiality of the misrepresentation in its relation to the contract induced thereby, and the materiality as applied simply to the question of true title.

We submit that it is sufficient if it be shown that the misrepresentation was material to the contract—that is, the representation related to a fact, the existence or non-existence of which would properly and naturally influence the minds of the contracting parties; as in the present case, the purchaser would be naturally and materially influenced in entering into a contract for the purchase of land by the representation that an older and outstanding title of uncertain legal validity did not to a considerable extent cover the tract which he was taking. The existence of such outstanding title, if it had been truly represented, presumably would have deterred the purchaser, and proof that the outstanding title will ultimately succeed is not an essential factor in determining the question of the materiality of the representation.

(c.) The representations made by Watts as to the limited extent of the interlock was not only erroneous and material, but it was relied upon by the vendee.

The suggestion in the opinion of Judge Ferguson that the older patents had been forfeited while presenting a risk which a purchaser might be willing to take when a minor portion of the tract was involved, presents a very different question when nearly the entire tract is involved, and the conclusion expressed in the opinion of the Circuit Court--

"but evidently Mr. Ferguson did not care, at the time he gave his certificate, how great this interlock was—"

does not follow from the fact that as a lawyer he expressed the opinion that the entire Rutter and Etting title had been forfeited and that thereby the Dillon title had become in its entirety good and valid.

So the further statement in the opinion:

"Was he (Ferguson) mistaken as to the law of the case, as thus presented. If so, neither Reeder nor Watts was responsible therefor."

The fact is, and it is not in any wise a doubtful matter, that Ferguson was mistaken in his view of the law, even though he is one of the most distinguished land lawyers of West Virginia. He applied to a transaction of 1840 a rule of law which did not come into existence until the statute of 1842.

What Judge Ferguson thought of this matter is found in his opinion, on page 27 of the Record.

"The only title which can be found older than the Dillon patent is a grant from the Commonwealth of Virginia to Rutter and Etting, dated the 9th day of January, 1796. There is, from the best information I can obtain, a small portion of the Rutter and Etting survey embraced within the Dillon survey, but the Rutter and Etting survey was forfeited long prior to 1837, in the State of Virginia, for the non-payment of the taxes thereon and for the non-entry thereof on the land books of the proper county, and was sold by the commissioner of delinquent and forfeited lands some forty or more years ago. At the time of the sale the taxes on the Dillon survey had always been paid, and for that reason the title to the whole thereof became good and valid, so far as the Rutter and Etting survey is concerned."

It thus appears that the forfeiture was prior to 1837. It appears from the Record, at page 180, that at the term of the Circuit Court of Fayette County, held April 3d, 1839, Alfred Beckley was appointed commissioner of delinquent and forfeited lands, and on pages 181 to 187, inclusive, is the report of Beckley, showing that he sold the same as delinquent and forfeited on the 15th and 16th days of December, 1840.

The statute in force at the time of this forfeiture and sale of Commissioner Beckley was the Act of March 10th, 1832, and it provided that all lands which by legislation were forfeited for delinquency in taxes, shall be transferred to and vested in the actual and *bona fide* holders thereof, claiming under grants from the Commonwealth, and shall be, and the same are hereby declared to be absolutely vested in such holders.

The persons who are entitled to the benefit of this statute, which has been construed in *Wild* vs. *Serpell*, 10 Grat. 405, are only those who are in actual possession of the land. Payment of taxes under a prior grant, without actual possession, is not sufficient.

By the Act of March 22d, 1842, the law was changed, and it was provided that forfeited lands:

"Shall be, and the same are hereby absolutely transferred to, and vested in, any person or persons (other than those for whose default the same may have been forfeited, their heirs or devisees) for so much as such person or persons may have just title or claim to, legal or equitable, claimed, held, or derived from or under any grant of the Commonwealth, bearing date previous to the 1st day of January, 1843, who shall have discharged all taxes duly assessed and charged against him or them upon such lands, and all taxes that ought to have been assessed and charged thereon, from the time he, she, or they acquire title thereto, whether legal or equitable:" Hutchinson's Land Titles, page 93.

Judge Ferguson evidently supposed that the provisions of the Act of 1842 were applicable to the forfeiture of the Rutter and Etting title. The failure to have before him the relative dates of the transactions and the statute led him into error.

While Watts and Reeder may not be responsible for this mistake in the sense that they induced Ferguson to make it, the fact

that the mistake was made is in itself a ground for appealing to a Court of Equity for relief.

By the terms of the contract it was not to be binding until Ferguson gave an opinion on the title, but the fact that Ferguson expressed a favorable opinion on the title does not deprive the vendee of his right to equitable relief if it is made to appear that in fact the title was not such a title as a purchaser is called upon to accept.

It is also important in considering this branch of the case, to wit, that the misrepresentation was relied on, to bear in mind that no examination of the records of the various public offices of West Virginia will throw any light upon the question of an interlock. The descriptions contained in a West Virginia deed, as in all the rural districts of the Middle States do not, until identified by actual survey of the property, show its actual location. Hence the most critical examination of the records will disclose nothing upon the question of interlock. Knowledge of these interlocks is confined to those acquainted with the history and tradition of the locality, and in all transactions large reliance is necessarily placed upon the statements made by the parties with reference to these matters. In the more fortunate Western States, where the entire body of land is plotted in the General Land Office as sections and quarter sections with mathematical exactness, and conveyances are made by perfectly certain lines defined by reference to these plots which are based upon the absolute parallels of latitude and longitude, an examination of the records shows with absolute certainty the extent of each tract, and no question of interlocks can arise, but nothing short of an examination of every patent and conveyance followed by actual survey of the lines upon the ground will disclose the interlocks of which the present case is a fair example.

The system of land grant, which brought about this troublesome condition, is briefly and clearly described as follows in Mr. Hutchinson's excellent work on *Land Titles in Virginia and West Virginia*.

"§ 1. The Government of the Commonwealth of Virginia,

very soon after the Declaration of Independence, established a Land Office, and provided a scheme for selling and granting the extensive domain of unappropriated lands belonging to the Commonwealth, and for ascertaining the rights of occupants and holders of lands theretofore settled and appropriated.

"These Acts were passed by the General Assembly of Virginia in May, 1779: App. 2; 2 Rev. Code, 1819, 354, 365, *et seq.*

"Under these statutes and amendments thereof, nearly all the lands lying west of the Allegheny Mountains, in the present territory of West Virginia, were granted.

"Upon the payment into the treasury of the State of two cents per acre, any person could obtain from the Register of the Land Office warrants for as much land as he had any desire to enter. The holder of such warrants might locate upon any waste and unappropriated lands, and he was required to enter and have his lands so located and surveyed within a fixed time, and return his survey to the Register.

"The Governor of the Commonwealth then issued a grant to the owner of the survey for the land therein described, and the title of the Commonwealth was thereby invested in her grantee. These grants are frequently called patents in statutes and decisions of the Courts.

"§ 2. The result of this loose, cheap, and unguarded system of disposing of public lands was, that in less than twenty years after the adoption of the system, nearly all of them were granted; the most part to mere adventurers, in large tracts or bodies, containing not only thousands, but in many cases hundreds of thousands of acres in one tract.

"Often the grantees were non-residents, and few of them ever saw their lands or expected to improve or use them for purposes other than speculation. The entries and surveys under warrants so cheaply and easily obtained were often made without reference to prior grants, thus creating interlocks, thereby covering land previously granted, so that in many instances the same land was granted to two or more different persons. Sometimes upon one survey actually located others were laid down

by protraction—constructed on paper by the surveyors, without ever going upon or seeing the lands—thus creating on paper blocks of surveys containing thousands of acres, none of which were ever surveyed or identified by any marks or natural monuments."

We submit that these facts have persuasive force in considering the question whether Watts' representations as to the interlock were relied on by the purchaser.

This brief statement of the case, the facts relied upon being taken from the admissions contained in the pleadings and proofs of Reeder and Watts, and not from the testimony of the plaintiff or his witnesses, establishes all the elements which are needed to justify the decree asked for.

The fact of misrepresentation is established, the materiality of the misrepresentation is shown, and the reliance of the plaintiff upon the material misrepresentation is proved. This we submit presents a case which should have induced the Circuit Court to have entered a decree declaring a rescission of the contract as induced by the misrepresentation of Reeder's agent, Watts.

But the decree of the Circuit Court did not stop with refusing its aid to Clark in his prayer for rescission, it affirmatively gave its aid to Reeder by an exercise of the highest of chancery powers in decreeing against Clark specific performance of the contract. A chancellor may sometimes refuse to rescind a contract, but a decree of specific performance will only be entered when the parties are free from fraud; the transaction also in itself must be equitable and the contract fair and represent the true intent of the contracting parties. The authorities cited in the principal brief establish beyond a question the proposition that a purchaser will never be compelled by a decree in equity to take a doubtful title, and as outstanding claimants are not and cannot be made parties to these proceedings, the Court will not undertake to determine the validity of such outstanding title. The fact that an outstanding claim of title exists which, when presented, may fairly engage the attention of the Court, bars the decree for specific performance.

This case is submitted as one in which the decree of the Cir-

cuit Court should be reversed and the cause remitted with instructions to enter a decree declaring rescission of the contract and directing a return of the money paid by Clark on account of the purchase-money.

JOSEPH S. CLARK,
RICHARD C. DALE,
of Counsel for Appellant.

Office Supreme Court U. S.
FILED.
APR 5 1895
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894. No. 262.

E. W. CLARK, *Appellant*,

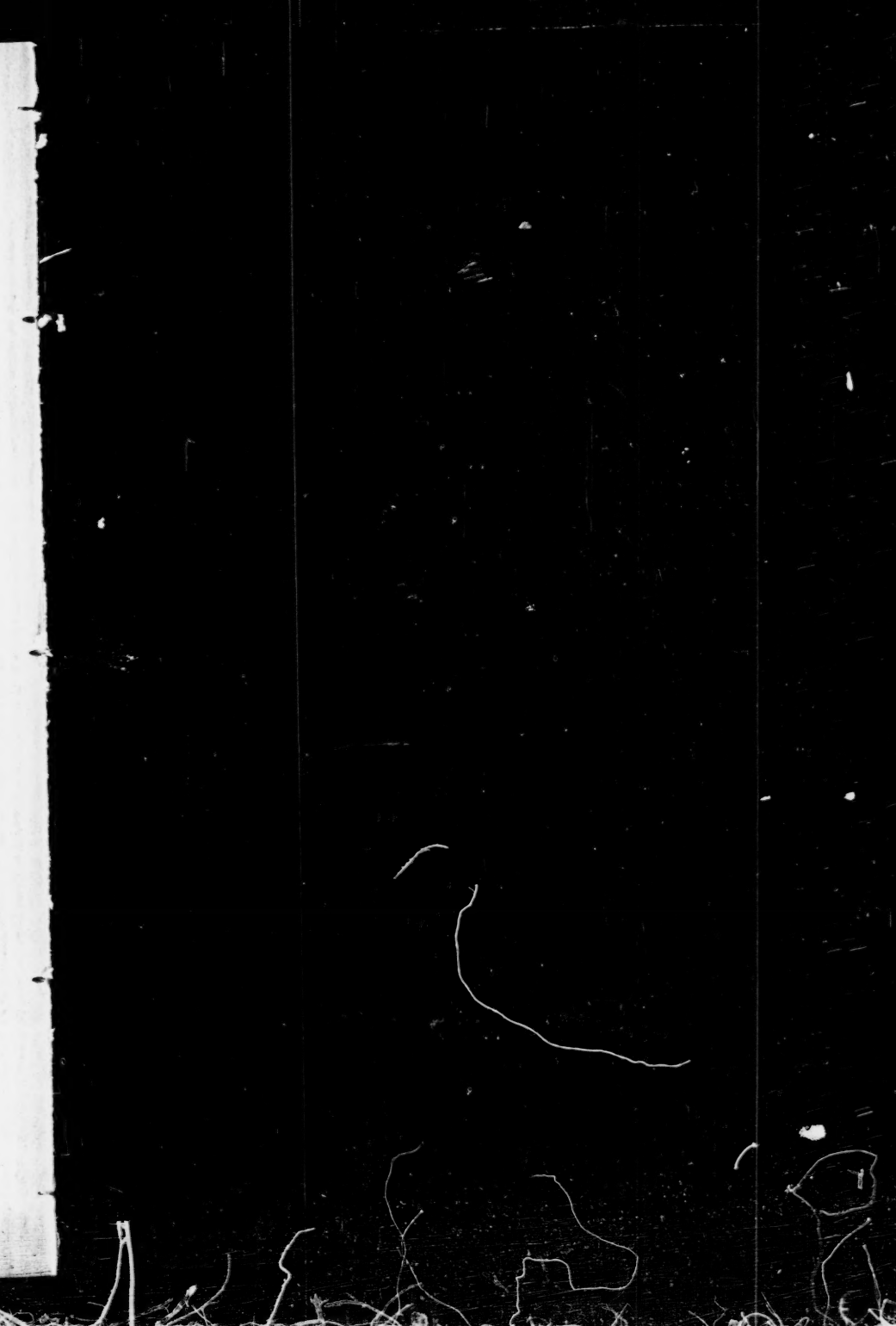
vs.

CHARLES REEDER, *Appellee.*

Appeal from the Circuit Court of the United States for the District of West Virginia.

BRIEF FOR APPELLEE.

BERNARD CARTER,
JAMES McCOLGAN,
Solicitors for Appellee.



Office Supreme Court U. S.
FILED.
APR 5 1895
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894. No. 262.

E. W. CLARK, *Appellant*,

vs.

CHARLES REEDER, *Appellee*.

Appeal from the Circuit Court of the United States for the District of West Virginia.

BRIEF FOR APPELLEE.

BERNARD CARTER,
JAMES McCOLGAN,
Solicitors for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894. No. 262.

E. W. CLARK, *Appellant*,

vs.

CHARLES REEDER, *Appellee*.

Appeal from the Circuit Court of the United States for the District of West Virginia.

BRIEF FOR APPELLEE.

Statement of the Case.

1. A grant or patent, dated April 16, 1796, was made by the State of Virginia, to Edward Dillon for 50,096 acres of land, situated in what was then the county of Montgomery; the entry for this land was made April 23, 1795, and it was surveyed May 28, 1795. At the time of the transactions involved in this controversy, this land was situated partly in the counties of Wyoming, Boone, Raleigh and Logan, and is spoken of and known as the Dillon survey or grant.

2. The grantee, Edward Dillon, having died sometime before 1855, the land was in that year sold for taxes and charges thereon, and at that sale purchased by Anthony Lawson and Evermont

Ward, to whom a deed was subsequently made on December 22, 1857, by the clerk of the County Court of Wyoming county, under the Virginia statute.

3. Subsequently, Lawson and Ward conveyed this land to Simpson, who conveyed it to Cox, by whom it was conveyed in the year 1870 to the Appellee, Reeder. (Rec. 24 to 26.)

4. Charles Reeder, the appellee, is and always has been a resident of the city of Baltimore, in the State of Maryland, being there engaged in the business of manufacturing steam engines.

C. C. Watts, formerly Attorney General of the State of West Virginia, who at one time resided in the town of Oceana, near to the land above mentioned, had been acting as attorney and agent for the appellee in matters connected with the land, for some 11 years or more, before the year 1884, and on January 3d, 1884, obtained from the appellee an option in writing to purchase the land, at the rate of $2,00[illegible] per acre, at any time before July 1, 1884, (Record, 77, 78.) Upon February 4, 1884, by another written agreement between them, the previous agreement was modified, so that if $25,000 was paid to the appellee in cash within 30 days from February 4, 1884, and an additional $1,000 paid to the appellee to reimburse him for certain outlays made by him, then the price of the land should be reduced from $2.00 to $1.50 per acre. (Record, 77, 78.)

5. In this state of case, H. M. Bell, an attorney at law and a member of the law firm of Eckles, Bell and Catlett (Record, 167) of Staunton, Va., acting as the agent of the appellant, who is a resident of the city of Philadelphia, in the month of January, 1884, entered into negotiations with ex-Attorney General C. C. Watts, for the purchase of the said land, in the profits of which purchase, if any, Mr. Bell, his partner, R. H. Catlett, (Record, 167, 168) Judge David E. Johnston, of West Virginia, and one or more other persons, were interested. (Record, 143.) These negotiations were begun in the city of Philadelphia in January, 1884, but having been broken off, were resumed in West Virginia in February, 1884, and as a result thereof, the written contract, which forms the subject of the controversy in this case, was entered into on February 29, 1884 between said C. C. Watts and H. M. Bell.

6. Before inserting this written contract, and in order that a portion of it may be properly understood, we bring to the attention of the Court the fact that in the year 1873, the appellee caused a survey to be made of the Dillon tract, which had been purchased by him, as above stated, in 1870; this *survey was made* by W. T. Sarver, a surveyor. (Record 432, 433, 437.) At that time, the appellee ascertained that there were a number of persons actually living upon portions of the land embraced within the outlines of said whole Dillon tract, and which persons claimed title to said land so in their possession, adverse to the title of the appellee; the number of acres so occupied and claimed by each being relatively small. (Record, 433.) At the time the contract of February 29, 1884, was drawn up, it was distinctly understood by the parties executing it that the appellee was not willing to sell any right he might have to the land so actually in the possession of persons living on it, altogether irrespective of the question of the validity of their title.

With this preliminary explanation, we now insert the contract of February 29, 1884.

Agreement made this 29th day of February, 1884, by and between C. C. Watts, of Charleston, W. Va., acting under an agreement in writing between himself and Charles Reeder, of Baltimore, Md., dated the third day of February, 1884, and as the agent of said Reeder, of the first part, and H. M. Bell, of Staunton, Va., acting as the agent of E. W. Clark, of Philadelphia, Pa., of the second part, witnesseth:

That the party of the first part, acting as aforesaid, has this day sold to the party of the second part, acting as aforesaid, a certain tract or parcel of land lying and being in the counties of Boone, Logan, Wyoming and Raleigh, in the State of West Va., containing 50,096 acres, be the same more or less, which tract of land was granted by the Commonwealth of Virginia to Edward Dillon by patent bearing date on the 16th day of April, 1796, and is now claimed and owned by the said Charles Reeder by a regular chain of conveyances, the first being a tax deed for said land, executed by the clerk of Wyoming county court to Evermont Ward and Anthony Lawson, bearing date the 22d day of December, 1857, executed in pursuance of a sale thereof for taxes delinquent thereon in the name of the heirs of Edward Dillon, and the last to the said Reeder from C. C. Cox, dated the 27th day of August, 1870, and for a particular description of said tract of land reference is had to said patent: upon the following terms and conditions, to wit:

First. Said sale of said land is a sale by the acre and not in gross.

Second. The party of the second part is to pay for the said land at the rate of one dollar and seventy cents per acre, as follows: Thirty-five thousand dollars to be paid on the day on which James H. Ferguson, a practicing attorney of Charleston, W. Va., shall certify the title of said Reeder to said land to be good and valid, which certificate is to be made within 30 days from this date; twenty-five thousand dollars of which sum is to be paid to the said Reeder, and the residue to said Watts. The balance of the said purchase-money is to be paid to said Reeder on the 1st day of June, 1884, or as soon thereafter as the necessary surveying can be done to ascertain the quantity of land within the bounds of the said patent to which the said Reeder can make good title. It is understood that the party of the second part is satisfied with the survey already made by Wm. T. Sarver of the exterior bounds of said tract of land, and that the surveying to be done is only such as may become necessary to ascertain what lands within said boundary are held by a better title than that of the said Reeder, by reason of adverse title and possession, all of which surveying is to be done at the expense of said party of second part.

Third. When the last of the purchase money is paid, the said Reeder is to convey said land with covenants of special warranty to the said E. W. Clark, or to such person or persons as he may direct.

Fourth. The balance of said purchase-money, after the date of the certificate of said Ferguson, it is to bear interest until paid.

Fifth. In addition to said one 70-100 dollars per acre, the party of the second part is to pay to said Reeder one thousand dollars as provided for in his contract with said Watts.

Sixth. This contract is subject to the approval of said Reeder, and is to take effect from the date of such approval, but the same shall then be void if the certificate of said Ferguson is not made within the time specified.

Witness the following signatures the day and year aforesaid.

C. C. WATTS,
H. M. BELL,
Ag't for E. W. Clark,

Approved March 4th, 1884.
C. REEDER.

7. It will be observed that upon the face of the paper it is declared that Watts enters into it, as it were, in a two-fold capacity; that is to say, first, by virtue of the relations created between the appellee and himself by the written agreement of February 3, 1884, (the true date was February 4,) and secondly, as the *agent* of Reeder, the appellee. By the agreement of February 4, 1884, Reeder gave Watts an option to purchase the land himself at $1.50 an acre, provided $25,000 thereof was paid by March 4, 1884, and $1,000, in addition to said purchase money,

was paid to Reeder to reimburse him for certain expenses incurred in connection with said land.

If this option was not availed of, then the only option Watts had was under his written agreement with Reeder of January 3, 1884, by which the price was to be $2.00 an acre.

It will also be observed that, as by the terms of agreement between Watts and Bell of February 29, 1884, Ferguson, the attorney, had 30 days from February 29, 1884, within which to pass upon the validity of the title, the option from Reeder to Watts to purchase at $1.50 per acre would have expired before the lapse of these 30 days.

These facts explain why the contract was entered into by Watts, as agent for Reeder, as well as on his own behalf, under his option contract, and was made subject (sixth article) to the approval of Reeder; the contract price being fixed at $1.70 an acre, it provided that $10,000 (that is, 20 cents an acre, on a basis of 50,000 acres) of the purchase money should be paid to Watts, and if this contract was approved by Reeder, it would, of course, be binding upon him, notwithstanding the fact that the $25,000 provided by the contract to be paid to Reeder, should not be paid till after March 4, 1884.

We have only stated these facts in explanation of the matter, for the information of the Court, but we shall treat the case in this brief, as Mr. Justice Harlan treated it below, just as if the contract had been executed by Watts, only as agent for the appellee.

8. The contract of February 29, 1894, was taken to Baltimore, by Watts and Bell, on March 31, 1884, and presented by them on the evening of that day to the appellee for his approval. Until so presented to him for his approval, the appellee had no knowledge or information that such contract had been entered into, and was in no way consulted in regard thereto, nor did he at any time before the institution of the suit have any knowledge of the conversations had between those connected with the making of said contract, or of any representations made in regard thereto.

On March 4, 1884, the appellee endorsed his approval on the said contract.

9. It will be remembered that the said contract of February 29, 1884, after providing that the land was sold by the acre and not in gross, provides that $35,000 is to be paid on the day on which James H. Ferguson shall certify the title of said land to be good and valid, which certificate is to be made within thirty days from the date of the contract; and that the balance of said purchase money was to be paid on June 1, 1884, or as soon thereafter as "the necessary surveying can be done to ascertain the quantity of land within the bounds of said patent to which Reeder can make good title." What is meant by this latter clause is explained in the clause immediately following it, thus: "It is undersood that the party of the second part" (Clark, the appellant,) is "*satisfied* with the survey already made by Wm. T. Sarver," (that made in 1873 for appellee) "of the *exterior bounds* of said tract of land, and that the surveying to be done *is only* such as may become necessary to ascertain what lands *within said boundary* are held by a better title than that of the said Reeder by *reason of adverse title and* POSSESSION."

10. As heretofore stated, it was known that some portion of the land embraced within the outlines of the Dillon tract, were in the *actual possession* of persons claiming title thereto. (Brief, p. 418) It was also supposed that many, if not all of these parties, claimed title to the land they occupied, under grants junior to that of the Dillon patent.

11. Acting under the said contract of February 29, 1884, Ferguson, the attorney named therein, and who at the time of its preparation and execution, and thereafter, *was the attorney of the Appellant Clark, and as such*, drew said contract, (Record, 107,) proceeded to discharge the duty thereby imposed on him, and before March 25, 1884, prepared and delivered a written opinion, dated March 22, 1884, occupying four printed pages of the Record in this case, which concludes as follows:

"I do therefore certify that in my opinion the title of Charles Reeder to the said Dillon survey is *good and valid, except to* such portions of said tract as may be affected by the claims of the *occupants* aforesaid, which may or may not be superior to the title of said Reeder." The occupants thus referred to are those persons in the *actual occupation* of the land claiming title thereto, the extent of whose holdings, we have seen, was to be

ascertained by survey, *which survey was to be made subsequent to*, and only *on condition*, that Ferguson gave a certificate that the title of Reeder was "*good and valid*" to the Dillon tract.

12. The contract of February 29, 1884, having provided that if Ferguson furnished a certificate within 30 days, that the title of Reeder to the Dillon tract (save as to the number of acres within its outlines held by adverse title and *possession*), was "good and valid," $35,000 of the purchase money should be paid on the day of the delivery of said certificate, and such certificate having been delivered to Watts, a meeting was arranged between him and Bell, the agent of the appellant Clark, in the city of Staunton, Virginia, and there, on March 25, 1884, the certificate of Ferguson having been delivered to Bell, he drew two drafts on the appellant at the city of Philadelphia, one for $10,000, in favor of Watts, and the other for $25,000, in favor of Reeder, the appellee, and delivered them to Watts—Watts depositing and cashing his draft on that day, and forwarded the $25,000 draft to the appellee; both drafts were paid by the *appellant*, and Ferguson's certificate sent to the appellant.

13. The next step, after the payment of this $35,000, required by the contract of February 29, 1884, to be taken, was a survey to be made, at the expense of the appellant, to ascertain what number of acres within the outlines of the Dillon tract (as those outlines had been established by the Sarver survey) were then held by persons who were in the actual possession thereof and claiming to hold them by title adverse to that of the appellee, and in order that the amount of the remainder of the purchase money over and above the $35,000 might be ascertained and paid to the appellee; this balance was to be paid by June 1, 1894, or as soon thereafter as the said surveys could be made, and was to be ascertained by deducting the number of acres so ascertained to be held by adverse title and possession, from the total number of acres in the whole tract, and multiplying the remainder so shown by $1.70.

It appears that a surveyor, M. A. Miller, was employed for this purpose in the spring of 1884, but no report of the result of his survey was made to the appellee till sometime in November, 1884 (Record, 431.) In this report as presented to the appellee by Mr. McGinnis, his attorney in West Virginia, to whom it was

given by the surveyor, Miller, Miller said: "There are a large number of small tracts held under junior patents lying within the Dillon survey, aggregating, approximately 2,500 acres, most of these, probably all, held by occupant claimants who have had them in continuous possession under their junior titles for many years." (Record, 431.) The appellee in his testimony referring to the foregoing statement in said report of Miller, (Record, 431,) says: "This sworn statement of persons holding better title by reason of adverse title and possession is the only information looking to a compliance with that clause of the contract which related to the surveying that has been furnished to me by E. W. Clark, (the appellant) or his agents, but no survey or exact determination, as the contract requires, has ever been furnished me."

There is no pretense on the part of the appellant, that at any time, he has complied with that part of the contract of February 29, 1884, which required him to ascertain by survey, the number of acres within the outlines of the Dillon tract, held by persons in the actual possession thereof, and claiming title thereto, adverse to the title of the appellee.

14. In the report of Surveyor Miller, furnished to the appellee in November, 1884, which report is dated October 29, 1884, (Record, 201,) he set forth that a large part of the land embraced in the Dillon Survey, was embraced in the land covered in the grant, made by the State of Virginia to Rutter and Etting, on an entry made by William Duval, for whom it was surveyed; this survey bears date March 30, 1795, and the grant bears date January 9, 1796, the survey being later, but the grant, prior to the grant of the Dillon tract. (Record, 201, 203.) In said report of Miller, as sent to the appellee in November, 1884, the names of parties, *not in possession*, were given, who claimed, or were supposed to claim, title to some portion of the land embraced within the interlock of the two surveys, under the Rutter and Etting title.

15. Subsequently to the receipt by the appellee of this report of Miller, the appellant being still in default in complying with his contract to have ascertained by survey the number of acres within the outlines of the Dillon tract held by persons in actual

possession thereof, and claiming the same by title adverse to that of the appellee, and so to ascertain the balance of the purchase money due to the appellee, the latter waited till the spring of the year 1885 (more than a year after the making of the contract) and then sent his attorney, James McColgan (his son-in-law) accompanied by his son, Oliver Reeder, to Philadelphia, to procure compliance by the appellant with the terms of the contract of February 29, 1884, and on their making known to the appellant their business with him, he said he had been informed that there were a number of persons, including a friend of his own, a resident of Pennsylvania, who claimed title to quite a large part of the Dillon tract, under the Rutter and Etting title; to this, Mr. McColgan replied, that what he had come to require of the appellant was that he should furnish the appellee with the names of the parties whom he claimed to be in possession of any part of the Dillon survey, with a better title than that of appellee, by reason of adverse title *and possession*. This demand was then made, with the statement that the appellee was ready to give to the appellant the land embraced in the Dillon survey, *excluding* the land held by persons in *possession under a claim of title*. The appellant declined to comply with this demand, saying that he expected to have a meeting of the persons interested soon, and would then give a definite answer. Some correspondence afterwards followed, without any definite result.

16. The next step in the history of the dealings between the parties to this cause was the filing of the original Bill of Complaint in this case.

B.

OUTLINE OF THE PLEADINGS.

The original Bill of Complaint was filed on August 1, 1885, in the Circuit Court of Boone County, a State Court of West Virginia. The case was subsequently, in October, 1885, removed on the application of Reeder, present appellee, to the District Court of the United States for the District of West Virginia.

(Record, 16.) And on March 2, 1889, transferred to the Circuit Court.

1. The allegations of the original bill are in substance as follows:

After reciting so much of the contract of February 29, 1884, as was deemed by the plaintiff material, a copy of the same being filed with it as Exhibit A, the bill alleges:

(*a.*) That Ferguson investigated the title of said Reeder to the said land, and made the certificate required by said agreement of February 29, 1884, within the 30 days, and thereupon the plaintiff, Clark, paid the $35,000, as required by said contract.

(*b.*) That at the time said agreement was entered into it was understood and believed by all the parties thereto that the title of Reeder to much the greater part of said land was good and valid, and that not more than 10,000 acres, if that much, could be held by others than Reeder by any sort of claim or title whatever, and that it was with this *understanding and belief* that the plaintiff made said purchase *and* paid the said $35,000.

(*c.*) That upon a survey made thereof, for the purposes mentioned in and required by said agreement, it was ascertained, to the great surprise of Clark, that the entire Dillon survey, with the exception of about 5,000 acres, was within the outlines of the Rutter and Etting patent; that the Rutter and Etting tract is now claimed by a large number of persons who assert that their title is valid and superior to the title of Reeder under the Dillon patent, and that plaintiff cannot safely pay any more of the purchase money under his contract while the cloud thus created hangs over said land.

(*d.*) That he had made various propositions of settlement with Reeder, all of which had been refused, among them a proposition to bring at his expense, in the name of Reeder, actions of ejectment against those claiming under the Rutter and Etting title, to test which of the two titles (the Dillon or the R. & E.) is the better; and that Reeder also refuses to bring such suits himself, but requires the plaintiff to pay for the whole number of acres, *after deducting* the number of acres held by *actual settlers*, amounting to some 5,000 or 6,000 acres, and requiring plaintiff

to take the risk of the Rutter & Etting title, which he, the plaintiff, *had refused to do.*

(*e.*) That the contract of purchase was entered into by plaintiff without any *knowledge whatever* of the conflict of title created by the Rutter & Etting patent.

(*f.*) That he believes Reeder was *equally* ignorant of any such conflict; and said agreement was therefere the result of *mutual mistake* as to the extent of the conflicting claims to said land, which was the subject of said agreement.

(*g.*) That if he had known, at the *date of said agreement*, of the existence of said conflict of title, he would not have entered into said agreement, at least until all questions as to such conflict of title had been settled and determined to his satisfaction; and that if he knew, which he did not, of the existence of said conflict of title, at the time he paid said $35,000, he would not have paid the same or any part thereof, until the settlement as to said conflict.

(*h*) That Reeder derived his title mediately through a tax sale of the Dillon land, and there was a question of the validity of the tax deed and the subsequent claim under it. And *it was this question* as to the title to said land which said Ferguson was appointed to report on, it being understood by both parties that if *this* title was declared by Ferguson to be good there was nothing but the small surveys aforesaid to interfere with the title of said Reeder to the whole Dillon tract; and hence it was stipulated in said agreement that Reeder was to convey said land to the plaintiff with covenants of *special* warranty, the plaintiff *taking the risk* of the validity of the Dillon title held by Reeder.

(*i.*) That by reason of the *older*, and, apparently, the better title, he cannot make his purchase available, and as he cannot bring ejectment, and Reeder will not, and especially in view of the *mutual* mistake above mentioned, plaintiff asks for a rescission of the contract and the repayment of the $35,000.

2. On March 30, 1886, Reeder filed his answer to the original bill, and thereafter, on May 5, 1886, filed a cross-bill against Reeder.

The answer, (Record, 18 to 23,) so far as it is necessary to give it here, is substantially as follows:

(*a.*) It denies that when the agreement of February 29, 1884, was entered into, there was any agreement or understanding between the parties other than or different from that embodied in the agreement, itself, or that there was any understanding between the parties, as to what number of acres might be held by others than Reeder, or what number might be excluded under said agreement.

(*b.*) While denying the claim or right of any person under the Rutter & Etting patent, or the validity of said patent, and averring that any title which might have once existed under said grant, was long ago forfeited, further avers that the plaintiff was fully advised to this effect in the certificate of opinion furnished under the terms of contract of February 29, 1884, the original of which opinion is in the possession of the plaintiff, a copy being filed with said answer (Record, 24 to 27): and the answer denies that the fact that there are persons who claim under said Rutter and Etting title, constitutes any cloud on the title to the land purchased by the plaintiff from the defendant, or furnishes any excuse for the neglect of the plaintiff to carry out his said contract; and the defendant avers that the said contract of February 29, 1884 was entered into on his part, and on the part of plaintiff, with the full knowledge that the *whole question of title* was to be passed on by Ferguson, the plaintiff's own selected attorney, before any money should be paid, and before the contract should take any practical effect; and that one of the especial matters considered by his said attorney, and reported upon by him, was the supposed conflict of said Rutter and Etting patent with said Dillon patent, and before the plaintiff paid any money under said contract. Bell, the agent of plaintiff, was fully apprised of the supposed conflict, and was advised that the Rutter and Etting patent had long since been forfeited.

Defendant further denies that it was upon the derivation of defendant's title through a tax title, or the validity of the tax title that Ferguson was appointed to report, but, on the whole title, as clearly appears from the agreement itself, and also from the certificate of opinion given thereunder by said Ferguson, which

considers and passes upon the question of the Rutter and Etting title.

That ample time was given by said agreement for the examination of all questions connected with said title, and if said examination did not show the title to be satisfactory, the agreement, was by its own terms, to become null and void.

(*c.*) Defendant admits that he had refused to bring, or authorized to be brought in his name, any actions of ejectment against persons claiming title to the said land, and this because not only it was no part of the agreement that he should take any such action, but before said agreement was entered into, Bell, the agent of the plaintiff, was distinctly informed that defendant would not agree to bring any action of ejectment against any persons in possession of, and claiming title to any portion of said land, and said Bell was also distinctly informed before said agreement was entered into, that defendant would convey said land with a covenant of special warranty, and said written agreement expressly so provides.

(*d.*) Defendant says, that though he had demanded of the plaintiff that he should ascertain by survey the number of acres within the boundaries of the Dillon tract held by better title than that of Reeder, by reason of adverse title and *possession* (which is the only thing which, under said agreement, remained to be done after the payment of the $35,000 paid on March 25, 1884, to entitle the defendant to the remainder of the purchase money,) he had altogether failed and refused to comply with his said obligation. The defendant thereupon averred that he was entitled to have the land covered by the agreement of February 29, 1884, sold under decree of this Court for the payment of the purchase money.

(*e.*) The defendant denies that there was any mutual mistake made in the execution of said contract.

3. The cross bill of Reeder. (Record, 28.) In this bill, after setting out the agreement of February 29, 1884, and averring that at the time of its execution, there were certain persons in possession of some portions of the land embraced within the outlines of the Dillon tract, claiming title thereto under junior claims, which persons, said Reeder, irrespective of the validity

of their claims, was unwilling to disturb, and therefore the provision in said agreement had been asserted which provided that surveys should be made at the expense of Clark to ascertain the number of acres within said outlines which were held by a better title than that of said Reeder by reason of adverse title and possession, and after averring that though the said Reeder had waited for more than a year after the making of said agreement, before demanding payment of the balance of the said purchase money, the amount of which could not be known till the above mentioned survey had been made, yet Clark, the purchaser, had altogether failed and refused to furnish Reeder a list of the persons holding lands within the boundaries of said tract by better title than said Reeder by reason of adverse title and possession, and had refused to pay the balance of said purchase money, alleging as a reason that claims were set up to some portions of said land, but not pretending that any person making such claim had better title than Reeder by reason of "adverse title and *pos session*," the cross bill asks that a decree may be passed for the sale of the land covered by the agreement of February 29, 1884, for the payment of the unpaid balance of the purchase money.

Further Proceedings on the Case.

After the foregoing proceedings were had, the proceedings now to be noted took place.

1. On May 14th, 1886, Clark filed an amended and supplemental bill, again averring his unwillingness to pay any more of the purchase money, until the question of the validity of the Rutter & Ettting title was determined, informed the Court that one Rockey was cutting timber on a part of said land, and that he should be restrained, and also that actions of ejectment should be brought against persons in possession of said land claiming adversely to Reeder, and asking for the appointment of a receiver or receivers. (Record, 34 to 36.)

Before this bill was actually filed, but after leave given to file it, the injunction prayed against Rockey was ordered, by the order of Court of May 6, 1886, (Record, 33,) and a receiver appointed with direction to bring such suits as he should be

directed to bring by counsel for Reeder or Clark, against all persons holding or claiming to hold adversely to said Reeder.

2. Reeder, on July 28th, 1886, (Record, 38) filed his answer to this supplemental and amended bill, reiterating the grounds taken in his former answer, and objecting to the appointment of receiver, and moving for their discharge. Rockey answered the bill, and filed a number of exhibits with his answer. (Record, 42 to 63.)

3. Then Clark, on November 13, 1886, (Record, 64,) filed his answer to the cross-bill of Reeder, re-stating and enlarging upon the matters set forth in his original bill, and relies on these and the knowledge that the facts revealed by the Miller survey as to the Rutter and Etting title, had been made known to Reeder, as an answer to his cross-bill.

4. Then C. C. Watts, on December 4, 1886, filed his answer to the original and amended and supplemental bills of Clark, setting forth substantially the same matters and things which had been set forth in Reeder's answers and cross-bill, and also stating all the facts and circumstances connected with the making of the agreement of February 29, 1884, the furnishing of the certificate of opinion by Ferguson, and the payment of the $35,000 on March 25, 1884.

The said respondent also averred that during the negotiations between Bell and himself, leading up to the making of the contract of February 29, 1884, the fact of an interlock between the Dillon survey and the Rutter and Etting survey was made known by Watts to Bell, though not knowing the extent of said interlock, he did not state it. He also says, that on the occasion of the payment of the $35,000, on March 25, 1884, the fact of this interlock was again the subject of conversation, and that said Bell declared that in veiw of Ferguson's opinion, this was immaterial.

5. Then, in the next year, on February 19, 1887, (Record, 80 to 87,) Clark filed a 2d Amendment and Supplemental Bill.

The substance of the allegations of this bill, except so far as they reiterate the allegations of the original bill, are as follows:

(*a.*) That neither at the time of the execution of the contract, or its approval by Reeder, did Clark, his agent, Bell or Ferguson,

his counsel, know that there was any interlock between the Dillon and Rutter & Etting patents, nor was any intimation given to them thereof by Reeder or Watts.

(*b.*) That it was not till after the signing and approval of said contract, and after an examination and investigation by Ferguson, of the claims of the junior claimants and occupants of the land, and of the possession of said tract of land by Reeder, and by Ward and Lawson, his predecessors in the ownership thereof, that anything was said by Watts about the Rutter and Etting survey, or about its interference with the Dillon Survey, and that when he did so speak of it, he spoke of it as a small and unimportant interference, which would not seriously affect the quality of land sold to Clark.

That though Ferguson had for *many years* been acquainted in a general way with the Dillon Survey, and always regarded it as good and valid, and the title unquestionable, and had long known of the Rutter and Etting Survey, and of the sale thereof, as forfeited and delinquent by proceedings for the purpose, yet he had never heard that said Rutter and Etting Survey covered any portion of the Dillon Survey; and when the fact came to his knowledge, after the approval of said agreement of February 29, 1884, *and after* the examination and investigation aforesaid, he, as far as was then possible, *looked into the matter*, and was satisfied that if there was any interference, it was so small and unimportant as not seriously to impair the value of the Dillon Survey, even if it should prove the better title; and that in this belief, he gave the information and opinion in regard to it, to be found in his certificate of his opinion.

(*c.*) That before the agreement of February 29, 1884, was reduced to writing, the whole matter was fully discussed, and it was the distinct understanding of Bell and Ferguson, and Watts, as they understood him, that the Dillon patent was the oldest patent, covering all the land embraced within it, and that there would not be any adverse claim set up to any of said land, except some junior grantee of some parts of said land, which holdings would not exceed 5,000 acres, and probably not be more than 2,500, the quantity, when ascertained, which Reeder was willing to deduct from the 50,000, and it was to ascertain the number of acres so

held that the survey mentioned in the agreement was provided for.

That it was with this understanding that the agreement was reduced to writing.

(*d.*) The bill then after putting to Reeder and Watts certain interrogatories requiring them to state what knowledge or information they had at the time said agreement of February 29, 1884, was signed and approved, of the Rutter and Etting survey, and of its relation to and the extent of its interference with Dillon survey, avers that when the original bill was filed it was with the belief by Clark that Watts and Reeder were altogether ignorant, when said contract was executed, that the Rutter and Etting survey interfered with the Dillon survey, and, therefore, he had alleged that there was a *mutual mistake* in regard to said interference and the extent thereof; but that if the existence of said Rutter and Etting survey and its interference with the Dillon survey had in any way come to the knowledge of Watts or Reeder, or if they suspected such interference, their failure to make known said interference *before said contract was executed*, was a fraud on Clark, whether so intended or not, and makes said contract null and void and entitles Clark to a rescission of the contract and the repayment of the *$35,000*.

6. On March 18, 1887, Reeder filed his answer to this second supplemental and amended bill, (Record, 88 to 92,) and on March 19, 1887, Watts filed his answer to said bill. (Record, 92 to 95.)

The answer of Reeder is in substance as follows:

(*a.*) That the *whole question* of the title to the Dillon survey was to be passed on by Ferguson, and was so passed on by him, and this appears both by the agreement and his certificate.

(*b.*) That whether Clark, or his agent or attorney, did or did not know *at the time of the execution of the agreement of February 29, 1884, or its approval by Reeder*, of any interference by the Rutter & Etting survey, is *altogether immaterial*, as said agreement specifically provides for a period of 30 days *after* the date of said contract, within which the counsel of Clark was to *investigate* and *certify* as to the validity of said title, and if he had not then reported upon and certified said title to be good and valid, said contract would have been wholly void; and the report

of said attorney shows that he was well aware of a conflict or interference between the two surveys, whatever may have been its *extent;* and thereupon Clark was advised of same conflict or interference between said surveys, before he made *any payment*, and if he had any objection to make to said title on this account, he should have made it before making said payment, and not having done so, it is now too late for him to set up a pretext of what he would not have done in an imaginary contingency as a defense for *his failure to perform the contract he made.*

(*c.*) That defendant had no knowledge of what representations were made at the time of the making of said contract; he was not present and had no knowledge as to what had taken place, and approved the agreement of February 29, 1884, when presented to him, relying on the terms thereof as embodying the contract between the parties and says its terms are altogether inconsistent with the understanding alleged in said bill to have been that of Clark, his agent and his attorney.

(*d.*) The facts connected with his knowledge of the Rutter and Etting survey are set forth in his answer, and will be referred to hereafter.

8. The answer of Watts (Record, 92 to 95) contains specific denials of the allegations of the bill in reference to what took place at the time of the preparation of the agreement of February 29, 1884, and sets forth all that did take place on this subject, and reiterates the statement made in his previous answer, that while he knew at the time said agreement was made that there was an interlock between the two surveys, he did not know the extent, and gave Bell and Ferguson all the information he had on the subject.

9. Some eight months after the filing of these answers of Reeder and Watts, and after the testimony taken before the hearing before Mr. Justice Harlan had been all taken, Clark filed on November 26, 1887, an amendment to his second supplemental and amended bill (Rec. 87), which amendment was an amendment by interlination, and would appear from Mr. Justice Harlan's opinion, not to have been brought to his attention.

The only difference between said amendment, and the 2d supplemental and amended bill, is that in the latter, the plaintiff

charges, that if Reeder or Watts knew, at the time said agreement of February 29, was entered into, that the Rutter & Etting survey interfered with the Dillon survey, their failure to communicate their knowledge to the plaintiff or his agent or attorney, was a *fraud* upon the plaintiff; in the interlineation amendment of March 26, 1887, it is charged that both Reeder and Watts, at the time of the execution of said agreement, knew of the interlock between the two tracts, and *nearly* the extent of it, and fraudulently withheld and concealed such knowledge, and thereby fraudulently induced the agent and attorney of the plaintiff to make said contract, while they were in utter ignorance of said facts; and that Watts fraudulently represented *there was no older title*, at the time said contract was executed, that there was no older title than the Dillon title, to any of the land embraced within the latter patent, and that the only claims which could be set up adversely to the Reeder title, would be under junior patents, and that Clark's agent and attorney entered into said contract, believing said representations, which they would not otherwise have done; and that said contract was therefore procured by said fraudulent representations and concealment.

10. Though this amendment was not before Mr. Justice Harlan when he heard the case, or escaped his attention, this fact is entirely immaterial, as he assumed and treated the 2d supplemental and amended bill as if it had contained the averments actually inserted in the interlineation amendment just referred to.

11. When the case, on the pleadings and testimony taken on both sides was heard before Justice Harlan, he filed an elaborate opinion, discussing the above case, and determined:—

1. That the plaintff had made out no case which entitles him to a recission of the contract.

2. That Reeder was entitled to a decree for the sale of the lands sold by him to Clarke by the agreement of Feb. 29, 1894. (Record 449-488.)

12. In accordance with this opinion, (in which the District Judge, Jackson, concurred) an interlocutory order was passed:—

1. Making the opinion of Mr. Justice Harlan a part of the record.

2. Referring the case to a special master, to ascertain and report all the parts of land within the exterior boundaries of the Dillon survey, as run by Sarver, which are shown to be in the possession of persons whose right thereto is better, by reason of adverse title and possession, than the title of Reeder; indicating in his said report what portions of said land so in possession, are in the possession of junior patentees, holding by a better right than Reeder; and what lands, if any, there are in the said survey so made by Sarver, and also within the Rutter and Etting survey, and are held by a better title than that of Reeder, by reason of adverse title and possession. The enquiry and report of the master was to be made on the papers in the case, with leave, however, to the plaintiff, if he desire it, to have another survey made, and proper directions were given in the order for taking of depositions in connection with said survey, and also made provision for the taking of depositions by either party.

The Court reserved until the coming in of the master's report, the question whether matter of the title and possession of any one whom Clark may allege to have a better right to any part of the lands than Reeder, shall be determined on the proofs then in the case, or which may be submitted with the master's report, or shall be determined by actions of ejectment. (Record, 448, 449.)

13. The Special Master proceeded to discharge the duties imposed on him, and made a report of his findings (Record 470 to 516), and also made a supplemental report (Record 589 to 591).

14. Thereupon, after exceptions by both parties, to the said Reports, the Court proceeded on May 30, 1891, to pass a Final decree in said cause. (Record 608).

By this decree, the Court adjudicated that the contract contained in the agreement of February 29, 1884, was a binding one on Clark and Reeder, and that thereunder there was due to Reeder by Clark $1.70 per acre, for the number of acres included within the boundaries of the Dillon survey as run by Sarver, after deducting from the whole number of acres, the number of acres held by persons who held said land by a better title than that of said Reeder by reason of adverse title and pos-

session; that the total number of acres within said exterior boundary is 54,970, and that the number of acres within said boundary, held by persons by better title than that of Reeder by reason of adverse title and possession, is 7,397, leaving as the number of acres to be paid for at $1.70 per acre, 47,572. The decree, then, ascertains the amount then due by Clark to Reeder at $70,064.96. Said amount including in addition to said unpaid purchase money for the 47,572 acres of land, charges for taxes, interests and the $1,000 mentioned in the 5th clause of the agreement of February 29, 1884; and decrees that upon payment of said sum of $70,000, with accruing interest, Reeder, his wife joining in the deed, shall convey said land to Clark by deed with a covenant of special warranty; and that on failure on the part of Clark to pay the said money, the said land shall be sold by the Special Commissioners named in the decree. And it was *further adjudged* that Clark do not have the relief prayed for in the original bill, and in his supplemental and amended bill, and as to Watts that said bills be dismissed. The decree further ordered that all actions of ejectment brought by the Receiver theretofore appointed, be dismissed, and the Receiver be discharged.

The opinion of Mr. Justice Harlan, (Record, 449 to 455,) is so able and exhaustive an examination of the whole case, that it is only after great hesitation that we have ventured to add any argument of our own.

Points and Argument.

The assignment of errors (Record, 612 to 614) by the appellant, when taken together, evidently are intended to present but two propositions.

1. That the Court should have determined that the contract or agreement of sale of February 29, 1884, was procured by the fraudulent concealment and false and fraudulent representations of Reeder, or his agent Watts, and is therefore null and void, and should be cancelled, and the money paid thereunder by the appellant to the appellee, be decreed to be repaid to him.

2. That at all events, the court should not have decreed the specific performance of the contract.

We will consider these questions in the order just stated.

Though in his original bill the appellant asked for the rescission of the contract of February 29, 1884, on the ground of a *mutual mistake* of himself and the appellee in regard to what, he in his said bill alleged, was a material matter, that is to say, the fact that the larger part of the land embraced in the Dillon survey was covered by the Rutter and Etting survey, of which fact, he in his said bill, alleged that both he and the appellee were ignorant at the time said contract was entered into.

Yet as by his second supplemental and amended bill, as originally filed, he claims that if the appellee or his agent, Watts were not ignorant of the fact above referred to, their concealment from the appellant and from his agent and attorney at the time said contract was executed, was a *fraud* on the appellant; and as by his interlineation amendment to his second supplemental and amended bill, he distinctly charges the appellant and Watts with the fact above referred to, and that the concealment of said fact was such a fraud as violates the said contract, averring also false and fraudulent representations by Watts, the case attempted to be made by the original bill, for a rescission of the contract on the ground of *mutual* mistake, must, of course, be considered as *abandoned*, and the rescission to be treated as asked for on the ground of fraud only, and so Mr. Justice Harlan treated the case in his opinion at the Circuit. (Record, 451.)

A.

1. The 1st question then is, what is the fraud charged by the appellant, and relied on as a sufficient cause for the annulment of the contract of February 29, 1884?

As the appellant, as late as November 26, 1887, and after all the testimony had been taken, and after he had filed an original bill, a supplemental and amended bill, and a *second* supplemental and amended bill, again got leave to amend the latter by

interlineation, for the express purpose of making the distinct charge of the fraud he relies on as the ground for the annulment of the agreement of February 29, 1884, the charge thus made must be considered as the one to be considered by the Court.

The charge of fraud thus made is this:

(*a.*) That before and *at the time of the making and execution of the agreement* of February 29, 1884, (which hereafter in this brief will be styled the "agreement,") Reeder and Watts knew of the existence of the Rutter and Etting survey, of its location with reference to the Dillon survey, of the interlock between said surveys and *very nearly the extent* of such interlock, and that the Rutter and Etting survey was the *older* of the two surveys.

(*b.*) That Reeder and Watts and each of them willfully, intentionally and with the intent to defraud Clark, withheld and concealed from him and from Bell and his agent, and from Ferguson, his attorney, knowledge or information of said matters, and thereby fraudulently induced Bell and Ferguson, who were in utter ignorance of these facts, to make and execute said agreement on behalf of Clark.

(*c.*) That Watts, on his own behalf, and as agent for Reeder, with intent to defraud Clark, falsely represented to Bell and Ferguson, *at the time of the making of said agreement*, that there was no older title than the Dillon patent, to any part of the land embraced therein, and that the only claims which could or would be set up adversely to Reeder's title would be grants for parts of said land junior to the Dillon patent; and that Bell and Ferguson, believing said statements to be true, entered into and executed said contract on behalf of Clark, which they would not have done, except for said statements of Watts, and their belief in their truth.

(*d.*) That the agreement was procured to be made and executed by Bell and Ferguson, by and through the aforesaid fraudulent concealments and false and fraudulent representations; and that but for said concealment and representations, said contract would not have been made. (Record, 87, 88.)

Now, before referring to the principles of law, or the facts as developed in the case, bearing on the matters here charged, it will be observed that by the charge thus made it is *first* averred that the agent and the attorney of Clark were induced and caused to make the agreement by reason of the omission of Reeder or Watts to *communicate* their knowledge as to the interlock between the two surveys; in other words, that the agreement was made on behalf of Clark, because Reeder and Watts kept silent; and then follows the averment that Watts did speak and falsely represent that there was no older title to any of the lands embraced in the Dillon survey, and that the only claims which could be set up, were claims under patents junior to the Dillon patent, and that Bell and Ferguson would not have entered into the contract but *for said representations* and *their belief in their truth.*

Here, therefore, on the very face of the allegations of the pleadings upon which the Court is asked to set aside the agreement, there is a direct contradiction as to the cause of the making of the agreement. For it is *first* averred that the *silence* of Reeder and Watts induced and caused the contract to be made; and then immediately follows the charge that except for the *affirmative representations* of Watts and the belief of their truth by the representatives of Clark, the agreement never would have been made.

If, therefore, the representatives of Clark would never have entered into the agreement if Watts had not made the affirmative representations charged to have been made by him, and the belief of their truth by said representatives, it is certain that the *silence* of Reeder and Watts as to the interlock, did not cause the making of the agreement; and yet it is distinctly charged that the representatives of Clark were induced to make the contract by *reliance* upon the said silence.

We submit, that in view of this direct and material contradiction on the part of the appellant, and made too, in the pleading, drawn by *Ferguson* himself, as the statement of the facts on which the relief is asked, and made after all the testimony had been taken, the Court will begin the investigation of the subject, with every presumption against the truth of *either averment.*

B.

Before referring to the facts of the case, we recall to the Court's recollection the principles of law applicable to the enquiries involved in the case; and in doing so, we do not feel it necessary to go outside the decisions of this Court, because there will be found all that is needed.

We refer to the following cases:

13 Wallace, 379, Slaughter's Admr. vs. Gerson.
125 U. S. 250, Southern Development Co. vs. Silva.
135 U. S. 615, Farrar vs. Churchhill.
142 U. S. 43, Farnsworth vs. Duffner.

In 125 U. S. 250, it is said:

"The burden of proof is on the complainant; and unless he brings evidence sufficient to overcome the natural presumption of fair dealing and honesty, a Court of Equity will not be justified in setting aside a contract on the ground of fraudulent representation. In order to establish a charge of this character, the complainant must show by clear and decisive proof—

"*First.* That the defendant has made a representation in regard to a material *fact;*

"*Secondly.* That such representation is false;

"*Thirdly.* That such representation was not actually believed by the defendant, on *reasonable* grounds to be true;

"*Fourthly.* That it was made with intent that it should be acted on;

"*Fifthly.* That it was acted on by the complainant to his damage; and

"*Sixthly.* That in so acting on it, the complainant was ignoront of its falsity, and reasonably believed it to be true.

The first of the foregoing requisites excludes such statements as consist merely in an expression of opinion or judgment, honestly entertained."

In 13 Wallace, 379, it is said, (Justice Field delivering the opinion):

"The misrepresentation which will vitiate a contract of sale, and prevent a Court of Equity from aiding its enforcement, must not only relate to material matter constituting an inducement to the contract, but it must relate to a matter respecting which the complaining party did not possess at hand the means of knowledge; and it must be a misrepresentation upon which he relied, and by which he was actually misled to his injury. A Court of Equity will not undertake any more than a Court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand, and equally available

to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations.

In 135 U. S. 615, it is said (the Chief Justice delivering the opinion):

"The general principles applicable to cases of fraudulent representations are well settled. Fraud is never presumed; and where it is alleged the facts sustainlng it must be clearly made out. The representation must be in regard to a material fact, must be false and must be acted upon by the other party in ignorance of its falsity, and with a reasonable belief that it was true. It must be the *very ground on which* the transaction took place, although it is not necessary that it should have been the sole cause, if it were proximate, immediate and material. If the purchaser investigates for himself, and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he relied on the vendor's representation."

In 142, U. S. 47, Mr. Justice Brewer delivering the opinion, it is said:

"This is a suit for the rescission of a contract of purchase and to recover the moneys paid thereon, on the ground that it was induced by the false and fraudulent representations of the vendors. In respect to such an action, it has been laid down by many authorities, that where the *means of knowledge* respecting the matters falsely represented, are *equally open* to purchaser and vendor, the former is *charged with knowledge* of all that by the use of such means, he could have ascertained."

Then, after citing the cases in this Court above referred to, the Court quotes with its approval, from the case of Ludington vs. Renick, 7 W. Va., 273, as follows:

"A party seeking the rescission of a contract, on the ground of misrepresentations, must establish the same by clear and impregnable evidence; and if it appears that he has resorted to the proper means of verification, so as to show that he, in fact, relied upon his own inquires, or if the means of investigation and verification were at hand, and his attention drawn to them, relief will be denied."

And after so quoting, the Court proceeds to say:

"In the case of *Attwood v. Small*, decided by House of Lords, and reported in 6 Cl. and Finn. 232, 233, it is held that if a purchaser, choosing

to judge for himself, does not avail himself of the knowledge or *means of knowledge open to him* or to his agents, he cannot be heard to say he was deceived by the vendor's representations. And in Pomeroy's Equity Jurisprudence, section 892, it is declared that a party is not justified in relying upon representations made to him. '1. When, before enterieg into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement. 2. When having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence. 3. When the representation is concerning generalities equally within the knowledge or means of acquiring knowledge possessed by both parties.'

"But if the neglect to make reasonable examination, would preclude a party from rescinding a contract on the ground of false and fraudulent representations, *a fortiori*, is he precluded when it appears that he did make such examination, and relied on the evidences furnished by such examination, and not upon the representations."

Under the guidance of these principles, we proceed to bring to the attention of the Court, those facts, which, in our judgment, bear upon the questions involved.

C.

1. In the first place, we refer to the agreement itself. (Record, 5.)

Omitting minor details not necessary for the present enquiry to be stated, the contract may be thus stated:—

A patent for a tract of land containing 50,096 acres, more or less, having been issued iu April, 1796, by Edward Dillon, and this land being at the time of the contract declared to be claimed and owned by Reeder, a chain of title set out on the face of the contract, the first paper mentioned being a tax deed, dated in 1857, and the exact number of acres included in the patent not being known, but it was known that some portions of the land within the outer boundaries, was in the actual possession of persons living on it, and claiming title thereto, adverse to Reeder, it was agreed, that the amount of the purchase money was to be so much an acre, ($1.70), the amount of the purchase money to be ascertained by multiplying by $1.70 the actual number of acreas within the outline of the tract as it had been surveyed by W. T. Sarver, a surveyor, after deducting from that actual

number of acres, such number of acres as should be ascertained by actual survey to be held by persons who held them by better title than that of Reeder, by *reason* of adverse title and possession.

This being the mode of ascertaining, eventually, the total amount of purchase money, in case the *agreement to sell* became an effectual sale, it was further provided that said contract of sale should *be void, unless* J. H. Ferguson, a practicing attorney in Charleston, W. Va., should, within 30 days from the date of the agreement, "*Certify* that the title of said Reeder to said land, to be *good and valid*." But if within said 30 days Ferguson should certify that the title to said land to be good and valid, then on the day he gave such certificate, $35,000 of the purchase money was to be paid, and that the remainder was to be paid by June 1, 1884, or as soon thereafter as the surveys needed to ascertain how many acres were in the actual *possession* of persons claiming title thereto adverse to Reeder, and that when said purchase money was paid, Reeder should convey by deed of special warranty only.

(*a.*) Now it must be noted that the land, Reeder's title to which must be certified by Ferguson to be good and valid, was the land which by the contract of sale, was agreed to be sold to, and was to be conveyed to Clark; now this land so agreed to be sold and conveyed, was *all the land* within the outward boundaries of the Dillon patent, *except* that which by survey *future in date* to the giving of his certificate should be ascertained to be in the *actual possession* of persons claiming adverse to Reeder, and with this ascertainment Ferguson was not to have anything to do, the *validity* of the claims of persons so in possession not to be the subject of enquiry, but simply the fact that they were in possession claiming title adverse to Reeder, and for this land Clark was not to pay. If the agreement to sell became effectual as a sale, the question of *how many* acres were sold was a mere matter of calculation, not in any way involving any question of validity of title and would be ascertained by deducting from the whole number within the outward boundaries, the number seen by the surveyor to be in possession of persons living on the land claiming title adverse to Reeder, and which survey was not to be made until after the agreement to sell had become a binding sale by the certificate of Ferguson.

The question therefore submitted to Ferguson, and to be *finally and conclusively* determined by him, was whether Reeder had a good and valid title to all that part of the land the agreement professed to sell; that is to say, all which by the patent of 1796, had been granted to Dillon, except those parts which should afterwards be found to be in the *actual possession* of persons who denied Reeder's title, and with the ascertainment of which Ferguson had nothing to do.

(*b.*) Therefore by the express and explicit terms of the agreement, drawn by Ferguson himself, the attorney of Clark, (Record, 107,) *all matters* which could in anyway, affect the validity of the title of the *land embraced* in the Dillon grant, were submitted to Ferguson, and he was by the terms of this submission bound to examine thoroughly every matter which could in any way prevent the title to be conveyed to Clark, and to be conveyed only by deed of special warranty, from being a "good and valid" title, that is to say, a perfect title in *fee simple.*

2. Refering again now to the allegation of the amendment to the second supplemental and amended bill, relied upon by the appellant, (Record, 87–88) (brief, 23) it will be found that the fraud relied upon to set aside the contract, is that Watts and Reeder, with knowledge that there was an interlock between the Rutter and Etting and Dillon surveys, and knowing very nearly the extent of such interlock, withheld that knowledge from Ferguson and Bell at the time the *contract was prepared and executed*, and that at the time of the making of said contract, Watts represented that there was no older title than the Dillon patent; and that but for said concealment and representation, the said contract would not have been made. It will be observed, that there is *no allegation* here that the certificate as to the title, which Ferguson is required by the agreement to give, and without which the contract was to become absolutely null, was given because of the reliance on the silence of Watts and Reeder as to the interlock between the two surveys, or reliance on the affirmative representations of Watts.

3. Now, by the very terms of the agreement it was to become null, unless Ferguson gave a certificate that the title was good and valid. Therefore, unless that *certificate was given* because of

reliance on the silence of Watts and Reeder as to the interlock between the two grants, or in reliance on the affirmative representations of Watts above referred to, it is clear that no case is made which even requires an examination of whether there was any duty on the part of Reeder and Watts to break their silence, or whether Watts made the representation he is charged with making, nor inquire into the right of the representatives of Clark to rely on said silence or representations. For as the contract was to become null and void unless Ferguson gave an affirmative certificate that the title was good and valid, then, even if the *contract* was made in the belief that there was no older grant covering this land than the Dillon grant, and so made because of the silence or false representation of Watts or Reeder, yet if Ferguson's certificate is not shown to have been founded on this silence or representation, and if, on the contrary, he, before giving said certificate, became aware of the fact of said interlock, the fact that he believed otherwise when the contract was made, is altogether an *immaterial fact*, and can furnish no ground for a recission of the contract. Now not only must the fraud relied on be clearly proved, but it must be distinctly alleged in the pleadings.

4. We submit, therefore, that on the case made by the pleading, the alleged fraud is *altogether immaterial*, and can have no effect on the rights of Reeder to have the contract stand unrescinded.

5. For when the party claiming to set aside a contract on the ground that he was induced to make it by the fraud of the opposite party, after multitudinous pleadings, in the way of original bill, and two supplemental and amended bills, and after all the testimony on the subject has been taken, including that of the draftsman of the contract, who is also the draftsman of all the pleadings, amends his pleadings for the special purpose of charging in definite and specific form, the very acts of fraud he means to rely on, why should not the Court refuse to consider any other ground than that he has deliberately chosen to stand upon?

If we are right in this position, any further discussion of the question of the rescission of the contract, becomes *altogether unnecessary*.

D.

But independently of the foregoing, and supposing the pleadings had charged that, or that the case is to be considered as if it involved, the enquiry whether, the certificate of Ferguson was caused by the conduct of Reeder and Watts, or of Watts above mentioned; that is to say, the withholding by Reeder and Watts the information they had as to the interlock between the two surveys, and the representation by Watts that there was no title older than the Dillon affecting the land embraced in the latter patent, we submit:

1. Now, assuming for the time being and for the purpose of the present discussion, that prior to the time of the preparation and delivery by Ferguson of the certificate, that the title of Reeder to the land was good and valid, Reeder and Watts, or either of them, knew of the interlock between the Rutter & Etting and Dillon surveys, and with intent to defraud Clark, withheld that information, it is very certain, upon the principles settled by the decisions of this Court above quoted, that this silence is absolutely immaterial, unless Ferguson not only in fact relied on it, but had the right to rely on it, as evidence that there was no interlock; and it is equally certain that the representation that there was no older title than the Dillon affecting the lands covered by it, is absolutely immaterial, unless Ferguson not only in fact relied on it, but had the right to rely on it, as evidence that there was no such interlock.

2. How stands the case then in this respect?

For answer to this question we have only to look to the Ferguson certificate itself, which, in its entirety, covers four pages of this Record. (Record 24 to 29.) In this certificate, after starting with the grant or patent from the State of Virginia to Edward Dillon, and showing that it was sold for taxes charged against it in the name of his heirs, and that it was purchased by Ward and Lawson at the tax sale, and a deed thereunder made to them by the Clerk of the Court of Wyoming county, and that said deed was defective, but afforded good and sufficient color of title to ripen into a good and perfect title by possession thereunder and payments of taxes thereon for a sufficient length of time, he then adds:

"I have made a *full and thorough examination and investigation of the matter pertaining to the title to this tract of land.*"

He then gives a detailed account of all the acts of ownership exercised over the land after its purchase by Ward and Lawson, and by Reeder, then traces the title through the mesne conveyances from the purchase by Lawson and Ward down to Reeder, noting chancery proceedings which took place during this interval and passing on their validity, and adding that "There are no *recorded liens of any sort* on said tract in any of the counties in which the same is situate, and said tract of land, so far as the records show, is free and clear of all *incumbrances;*" and immediately following the statement just quoted, is the following:

"The only title which can be found older than the Dillon patent, is a grant from the Commonwealth of Virginia to Rutter and Etting, dated the 9th day of January, 1796. There is from the best information I can obtain, a small portion of the Rutter and Etting Survey embraced within the Dillon Survey, but the Rutter and Etting Survey was forfeited long prior to 1837, in the State of Virginia, for the non-payment of the taxes thereon, and for the non-entry thereof, on the land books of the proper county, and was sold by the commissioner of delinquent and forfeited lands, some forty or more years ago. At the time of that sale, the taxes on the Dillon Survey had always been paid, and for that reason, the title to the whole thereof, became good and valid, so far as the Rutter and Etting Survey is concerned."

Then after showing how many acres of said tract had been put upon the tax books of the several counties and that the total amount so taxed aggregated 55,000, and after saying that as far as could be ascertained without going over the whole land, there were about fifty persons living on the land, partly tenants of Reeder and partly claimants of parts of the land, and then states his belief that in view of the possession of the land for nearly twenty-five years by Reeder, and those under whom he claims, the number of acres to which these junior claimants can make title will be comparatively small, he concludes his certificate with these words:

"I do *therefore certify* that in my opinion the *title* of Charles Reeder to the said *Dillon survey* is *good and valid*, except as to such parts of said tract

of land as may be affected by the claims of *the occupants* aforesaid, which may or may not be superior to the title of said Reeder.

"Given under my hand this 22nd day of March, 1884."

3. ~~In the face of the~~ conclusive evidence, afforded by this certificate of Ferguson, that he not only realized that it was his duty before he gave a certificate, that the title to a tract of land his client was about to purchase, was good and valid, and on the giving of which that client was to be bound irrevocably to a purchase involving nearly $100,000, and would be bound to accept a deed with only a covenant of special warranty, to enquire into all matters affecting that title, and that the bearing of any older title than the Dillon title, upon the land sold, or any part thereof was a material enquiry; but it also affords conclusive evidence, that he had ascertained that at least a part of the land his client was about to purchase was included in the older grant.

4. This certificate further furnishes *conclusive evidence* that Ferguson did not refuse to allow the fact that there was an interlock between the two grants to prevent his certifying that the title was good and valid, because from the best information he could obtain there was but a small portion of the land covered by the Dillon grant, which was within the Rutter and Etting grant; but that the reason he refused to allow the fact of the interlock to prevent him from certifying that the title to the land covered by the Dillon survey was good and valid, was because he knew, and declared that the Rutter and Etting grant had been forfeited long prior to 1837 by the State of Virginia for the non-payment of taxes and for the non entry thereof on the land books of the proper county, and because he determined and adjudged as matter of law, that because of said forfeiture, and the fact that the taxes on the land held under the Dillon grant had always been paid, the forfeiture of the Rutter and Etting grant, operated to vest that title in the holder of the Dillon title.

5. Now, although Ferguson testifies (Record, 110) that he obtained the information that a portion of the land covered by the Dillon grant was included in the Rutter and Etting survey from Watts, in the interval between the execution of the agreement of

February 29, 1884, and the giving of his certificate; and that he represented the interference as but small and inconsiderable, yet as the appellant, through the same counsel, in the averments in the pleadings, declares that the fact that there was any interference was so vital a matter that if known at the time the contract was entered into, it would not have been made in the form it was made, the conclusion cannot be resisted that as soon as the fact of an interference was communicated to Ferguson, he was bound to examine into the extent of such interference, if he considered the question of the existence of such interference material. By the terms of the agreement his client was not to pay for any more land than a good and valid title could be made for. A number of acres which Watts might consider a small proportion of the whole, might be in the estimation of the appellant, or Ferguson, a considerable portion.

It is impossible, therefore, to conclude that the interference was considered immaterial because Ferguson had been informed the number of acres was a smaller one, no figures being given, without attributing to Ferguson a gross and unpardonable dereliction of duty. And his certificate, as we have said, shows *beyond all peradventure* that he did not regard the interference as immaterial because the interference was supposed to be small, but because he had examined the question of the validity of the Rutter and Etting grant and determined and decided it to be altogether null and void, and that by its forfeiture the Dillon title to land embraced in the Dillon grant, which had been common to the Rutter and Etting grant, had become perfected.

6. By virtue therefore of the knowledge brought home to Ferguson before he gave his certificate of title, that there was an interlock, all effect of the failure of Reeder and Watts to tell him of it, (*if they did so fail,*) before the contract was made, and all effect of the assertion by Watts that no older title interfered with the Dillon grant, (*if he ever said so,*) are entirely done away with.

E.

But independently of the foregoing, and even if it was not so conclusively shown, as it is, that with full knowledge that there

was some interference between the two surveys, Ferguson considered and decided this fact altogether immaterial, not because he had been informed that the interference was a small one, but because he decided the Rutter & Etting title to have no longer any existence; and suppose there was any reason to conclude that he decided the interference should not prevent his certifying the title to be good and valid, because it was so small, and believed it to be small because Watts so represented the interference, yet upon the principles established by the cases above cited, this would not entitle the appellant to have the sale set aside.

For—

1. "Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say in impeachment of the contract of sale that he was deceived by the vendor's misrepresentations."

13 Wall. 379.
142 U. S. 47.

Now, it is nowhere pretended by Ferguson in his testimony that Watts had any source of information as to the extent of the interference between the two grants above referred to, which was not open to every one; and indeed Ferguson testifies that Watts first told him of this interference after the return of Watts from his trip over the land in company with Ferguson's partner, Camden, (made in the interval between the signing of the agreement and the giving by Ferguson of his certificate,) which trip was made for the purpose of getting affidavits to show possession of the land by Reeder; and that then Watts told him there was a small interference between the two grants, "but I can't state whether he said *anything* as to *when* he obtained the information. But I know that I understood, from what he said, that he had learned of such interference on that trip." (Rec 110-111)

Now, if this statement of Ferguson be true, it is perfectly manifest that Ferguson must have understood that the source of Watts' information must have been some hearsay obtained in the course of a hurried trip through the country.

Now, no accurate information could be obtained on this subject, at least without a survey being made of the two tracts. Therefore, it was just as much within the power of Ferguson as within the power of Watts to get accurate information on this subject; upon the principle therefore, just quoted, he had no right to rely on Watts' representation on a subject which he now declares was so important.

2. But not only had Ferguson equal opportunities to get information on this subject, but according to his own statement and that of Bell, the agent of Clark, and of Knight, a witness for Clark, he was specially qualified for, and by reason of what he knew about such matters, and the instructions he had received, specially charged with, the duty of making a thorough investigation of the extent of this interference, if he considered an interference material.

(*a*) It appears from the Record by the testimony of the appellant's witness, E. P. Knight, that the examination of land titles in West Virginia, their forfeiture and validity and overlapping of different grants for the same land, and the construction of the laws of Virginia and West Virginia, in regard to land titles, is a specialty in the profession, and but few members of the profession become expert in reference thereto, and that James H. Ferguson has had a large experience in this line and is the oldest practitioner now in active service that has made the West Virginia land titles a specialty. That C. C. Watts is not such a specialist. (Record, page 177.)

That James H. Furguson, before being employed in this case, had practiced many years in the counties where this land is situated. That he was familiar with matters relating to these large surveys. That there were quite a number of them piled upon top of each other, more or less. That their boundary lines were all in confusion, and that it has transpired that several of them cannot be located at all. (Record, pages 116 117.)

That in the course of his practice and residence in said counties he became acquainted with both of these surveys, and with the fact that the Rutter and Etting had been sold as forfeited and delinquent. (Record, pages 116, 117.)

(*b.*) Ferguson, in his said testimony, (Record, 116, 117,) says:

"I have practiced law for many years in the locality in which the surveys referred to are located. When I *commenced* practicing in that locality, the counties of Boone, Raleigh and Wyoming, had not *then* been created. When I *first commenced* to practice in that locality, said surveys, as I now understand their boundaries, were in the counties of *Fayette* and Logan, but at *that time* I had never heard of either of them.

"*In the course* of my practice in Logan county, I became acquainted with the existence of both of the surveys, and with the fact that the Rutter and Etting had been sold as forfeited and delinquent by General *Alfred Beckley*, Commissioner of Delinquent and Forfeited Lands for *Fayette* County."

He began his said residence in Logan county in 1845. (Record, 117.)

(*c.*) Here, therefore, he distinctly declares that in the course of his practice and *residence* (years before this controversy) in Logan county, he became acquainted with the existence of both of these surveys and knew at that time that the Rutter and Etting had been sold as forfeited and delinquent, by General Alfred *Beckley*, the Commissioner of Delinquent and Forfeited Lands for *Fayette* county.

(*d.*) When, therefore, he states in his Certificate of Title, dated March 22, 1884, (Record, 27,) that the Rutter and Etting title had been forfeited by the State of Virginia, and sold for the non-payment of taxes by the Commissioner of Delinquent and Forfeited Lands, he was stating a fact which he had become acquainted with during his practice as an attorney in the counties in which the land lay. This sale took place in 1840, a few years before he took up his residence and began his practice in that locality.

(*e.*) *Now, the very report of* GEN'L BECKLEY, the commissioner *who sold the said Rutter and Etting tract*, made to the Circuit Court of Fayette County, on which report, the Court ordered the sale made, after stating (Record, 181) that the Rutter and Etting grant had been carefully re-surveyed, (which survey is included in the report,) DISTINCTLY STATES, that this survey shows that within the boundaries of said Etting and Rutter grant, there is included, *nearly the whole of the 50,096 acres patented to Edward Dillon, 16th April, 1796.*

37 - 73

(*f.*) As therefore the *Court Records* of the proceedings connected with the forfeiture of the Rutter and Etting grant mentioned in Ferguson's Certificate of Title, contained a declaration, (whether correct or not is immaterial,) that after a careful survey of the Rutter and Etting grant, it was ascertained that nearly the whole of the Dillon grant was included within the Rutter and Etting grant, Ferguson is chargeable with the knowledge of this declaration.

It must of course be assumed that *he had examined* these proceedings at some time before he gave his certificate of title, for it would be *crassa negligentia* on his part to advise his client that a title older than that which he was purchasing, had been forfeited by proceedings which he had not examined himself. But whether he did, or did not examine these proceedings, as they were those under which the forfeiture mentioned in his certificate of title took place, he is, upon the principles established by the decisions of this Court above cited, chargeable with the knowledge of all they contained.

He is, therefore, chargeable with the knowledge that General Beckley *claimed* in 1840, that nearly the whole of the Dillon survey was within the boundaries of the Rutter and Etting survey; and even, therefore, if General Watts did tell him (which General Watts denies,) that but a small part was included, he was again guilty of *crassa negligentia*, (if thinking the question of the *extent* of the interlock was material) he relied on the statement (which, moreover, he knew could only be of *necessity*, a matter of *opinion*,) of General Watts, as determining the question of the extent of the interlock.

13 Wall. 379.
142 U. S. 47.

(*g.*) Now, independently of the knowledge, thus by presumption of law at least, if not in fact, brought home to Ferguson, that it was claimed that nearly the whole of the Dillon grant was included within the Rutter and Etting grant, the fact that Watts had informed him that a part of it was so included, made it the clear duty of Ferguson (if he considered the interference between the two surveys in any way material,) to have a survey made before he gave his certificate of title.

37-b.

See on this point the opinion of Mr. Justice Harlan, (Record 454,) and—

13 Wall. 379.
142 U. S. 52.

(*h.*) But, *a fortiori* was he required to have this survey made (if he considered the interference material) when the Record proceedings under which the Rutter and Etting title was forfeited, and with which proceedings he must be assumed to have been familiar, contained the declaration that nearly the whole of the Dillon tract was included within the lines of the R. & E. grant.

And here we appropriately make a quotation from the opinion of this Court in the case of Farnsworth vs. Duffner, 142 U. S. 52, (a case quite similar to the present case):

"It is worthy of remark here, that in the latter part of the eighteenth century it was a common practice for the State of Virginia to make grants of large tracts of land in the then unoccupied portions of the State now included in the State of West Virginia, the boundaries of which grants were often conflicting and overlapping. Hence arose, under authority of the statutes, a form of patent known as an 'inclusive' grant. Grants of that nature were before this court, and considered in the cases of *Scott vs. Ratliffe*, 5 Pet. 81; *Armstrong vs. Morrill*, 14 Wall. 120; and *Halsted vs. Buster*, 140 U. S. 273. So the exact tract of land which any of these patentees actually acquired could only be determined after surveys, and a comparison of the dates of the entries, surveys and patents. And as the descriptions in tax proceedings followed those in patents and other deeds, —lands being listed in the names of the owners according to the system then obtaining in that state,—the same uncertainty of boundary existed as to lands held by tax titles. But with reference to all these matters, alleged as defects in the title, it is enough to say that they were apparent on the records, were open to the inspection of plaintiff and his counsel.

And to show that it was distinctly understood by Ferguson that his examination should be full, we refer to the testimony of Bell, the agent of Clark.

He says he had stated to Mr. Watts, that as one defect had already beeen found in Mr. Reeder's chain of title, there might also be other deficiencies therein, and as he was acting for Mr. Clark, whe was an entire stranger to this tract of land, he was unwilling to close the purchase without giving Judge Ferguson ample time to investigate fully said title, and that he did not believe such examination could safely be provided for in the contract in a less time than thirty days, (Record, page 148; question and answer 53) That he informed Judge Ferguson that Mr. Clark relied upon him to examine the title to Mr. Reeder's land, that he, Bell, was not authorized to buy it except on Ferguson approving the title. (Record, page 148; question and answer 44.)

3. But not only was Ferguson, if he thought the fact of an interference between the two surveys material, (which we ~~shall~~ show, he did not think, because he determined that the Rutter and Etting grant had been forfeited,) bound, by survey and otherwise, to ascertain the state of case without any assistance from Reeder or Watts, and in spite of any statements they made on the subject, (there is no pretense that Reeder made any,) but the fact is that he was furnished with copies of both the Dillon and Rutter and Etting grants, which were sent to Watts by Reeder. (Record, 435.)

All the title papers so sent were delivered to Bell for Ferguson. See testimony of Bell. (Record, page 141, question 8; Record, 145, question 32 and 33.)

But it further appears from the statement of Ferguson himself that he did not, in certifying that the title to the land was good and valid, do so in reliance upon the statement which he says Watts made to him that the interference between the two grants was small and unimportant, but on the contrary, that after receiving this representation from Watts and before issuing his certificate, looked into the matter and was satisfied that if there was any interference between the two surveys, it was so small and unimportant as not seriously to impair the Dillon survey. (Record, page 83).

Now, although his certificate shows that the statement here made that he decided that the interference was immaterial because it was so small, is not true, but that he in truth decided it to be immaterial because the Rutter and Etting survey had been forfeited, yet it is impossible that the Appellant shall be allowed to claim that Ferguson based any action which he took in giving his certificate, upon reliance on the statement of Watts as to the extent of the interference, when Ferguson himself declares that he looked into the matter himself and reached his conclusion from that examination.

F.

We have thus far considered the case on the assumption that Reeder and Watts, at the time the agreement was entered into, and the certificate was given by Ferguson, not only had heard that a part of the land covered by the Dillon grant was included in the Rutter & Etting grant, but also, as charged in the the amendment to the second Supplemental Bill of Clark, knew of its extent, and knew that the Rutter & Etting grant included the larger part of the Dillon grant, and also believing it to be something which, if known to the appellant or his attorney or agent, would prevent the sale of the land, wilfully and fraudulently withheld the information, and that Watts affirmatively represented that there never had been any older grant which affected the Dillon title.

But so far from this being the case:

1. Even at the hearing of the case before Justice Harlan, and with all the testimony before him, that Judge said: "I am satisfied that *no one* connected with this business knew the full extent of this interlock."

2. There is no pretence that Reeder ever at any time made any representation to the appellant or to his agent, or his attorney, on the subject of the Rutter and Etting patent, or its relation to the Dillon patent.

But so far from there being any ground for attributing to him any conduct inconsistent with the most perfect good faith and fair dealing, his testimony, which is in no way contradicted, shows

that in the course of the survey of the Dillon tract made in 1873, made by W. T. Sarver, *the very survey which by the agreement of February 29, 1894, is declared to be taken as ascertaining satisfactorily to the Appellant*, the bounderies of the land thereby agreed to be purchased, this surveyor discovered that there was some interference between the two surveys, and pointed out the place where the south line of the Rutter and Etting survey crosses the western line of the Dillon survey; and he says that in the same year "I obtained certified copies of the original surveys and grants of both tracts, and from the description of the last (East) line of the R. & E. survey crossing the head waters of Guyandotte, it did not seem probable that this survey ran altogether across the Dillon survey. Exactly how much land was embraced in the interlock was not known, *and I did not consider it important to know*, as I was advised by my counsel, and had other good authority for believing that the Dillon title would unquestionably hold as against the R. & E., and consequently as against titles derived therefrom. (Record, 432.)

He also proved that in 1883, he learned that one Iverson Bailey was holding and had held for some 8 or 9 years a number of acres inside the Dillon lines under a lease from a party claiming title derived from the Rutter and Etting title; and that he entered suit and had him ejected. (Record, 433.)

And in further relation to the said R. & E. survey, he says in his answer, (Record, 91) to the second supplemental bill:

"I did not then," (referring to the time the agreement was made) "nor do I now, know to what extent the R. & E. survey laps on the Dillon, nor do I think that any one else knows, because from the facts which have come to my knowledge, I do not think that any more than the first line of the Rutter and Etting survey was ever run by the surveyor originally." (Record, 91.)

And in connection with his testimony that he had been advised by his counsel, and had other good authority for believing that the Dillon title would hold against the R. & E. title, we refer to the letter addressed to him by Watts in *1873*, and offered in evidence by appellant, (Record, 442, 443,) in reply to one from Reeder, enclosing him a sketch, (Record, 444,) made from the Sarver survey, which sketch showed that a large part of the

Dillon tract was included in the R. & E. grant, in which General Watts, not only gives his own reasons for believing that the sketch did not truly represent the relation of the two tracts, and that, in his judgment, "it will be *impossible* for the Duval, (this is the R. & E., the original entry having been made by Duval,) to lap on the Dillon survey," but he tells Mr. Reeder that he had shown Judge Ward, (formerly the owner of the Dillon tract,) but then a judge of Court, the sketch and the plats Reeder had sent, and Judge Ward told him to tell Reeder "he could hold in spite of thunder," and that the Dillon survey was perfect, the best in West Virginia, and that the Duval (R. & E.) had *never been run;* and General Watts added: "I am satisfied the same is true, and that the Duval was gotten up solely for speculation."

3. From the foregoing, it cannot be denied that Mr. Reeder was thoroughly satisfied that there was nothing in the R. and E. grant in any way to interfere with the validity of the Dillon grant and his title thereto.

4. But though thus satisfied, he sent all his title papers and his copies of the surveys of both tracts, as heretofore shown, to General Watts, at the time a sale was contemplated to be made of this land, (he says either in December, 1883, or early in January, 1884, and at the time, therefore, when Watts was contemplating the purchase himself,) "for examination, in order that there should be a full and thorough examination." (Rec 919

5. Now, by all the decisions of this Court cited above, even where there is an affirmative representation of a material fact connected with the transaction, before said representation can be made the basis of a charge of fraud, it must be shown that such representation was not only false, but it must also be shown that the person making it has no *reasonable* ground to believe it to be true.

Even, therefor, if Reeder had affirmatively represented that the Rutter and Etting grant in no way affected the validity of the title held under the Dillon grant, he would have had most reasonable ground to believe his statement to be true.

6. As to the conduct of General Watts—General Watts testifies, and sets forth in his answers to all the bills in the case, that while he had been informed before the making of the agreement of February 29, 1884, and as early as 1873 or 1874, that there

was an interloch between the two grants, he did not, at the time said agreement was made, nor did he when he filed his answer, know the extent of the said interlock; that he had an impression, but how, or from whom he got it, he did not recollect, that the interlock embraced some 5,000 or 6,000 acres; that he understood from Judge Evermont Ward, (former owner of the Dillon property), while he was judge of the Wyoming Circuit Court, that there was an interlock, but that the Rutter and Etting survey had long since been forfeited, and that the same did not in any way interfere with the Dillon title. (Record, 95.)

He also had this information while residing at Oceanna in 1873 or 1874; that at the time the contract was entered into he did not know the extent of the interlock, nor did he know it until after the Miller survey, which was therefore after the payment of the $35,000. Record, 424, 425.

7. General Watts also testified that during the negotiation which ended in the agreement of February 29, 1884, he communicated to Bell and Ferguson the above mentioned impression which he had, as above stated, that the interlock amounted to some 5,000 or 6,000 acres, and also told them that he did not know how he came by this impression, nor how far it was correct. He also denied most positively that he at any time told Bell or Ferguson that there was no other title than the Dillon, which covered the same land. (Record, 425.)

8. He also testified that at the time the $35,000 was paid in Staunton, Va., on March 25, 1884, he pointed out to Bell, by reference to a map described in his answer as Swann's map (Record, 422) the location of the Dillon survey as he understood it in reference to the Duvall (or R. & E.) survey, which latter survey was on the map, though the Dillon was not; and that Bell said, if such was the relation of the two surveys, the R. & E. survey included nearly all the Dillon survey, and Watts told him he had not so undersrood it, but he did not know the extent of the interlock. Bell then said he thought nearly all the Dillon survey was covered by the other, but it was immaterial, as Judge Ferguson's opinion, which he then had before him, showed clearly the forfeiture of the Rutter and Etting, and that it was not in the way of the Dillon survey.

9. Now, in reference to this last mentioned conversation, all that Bell says, when asked whether it took place, is:

"I have no recollection of any reference to the Swann Title Map being made, or of any remark of mine in reference thereto, or of a reference to any other map being made. I have a copy of Swann's Title Map, however, in my office. I have examined to-day a copy of Swann's Title Map, and find that the Dillon Survey is not laid down on it, and repeat, that if a reference was made to that map, I have no recollection of it. It *made no impression on me.*"

9. While Bell and Ferguson deny that, either at the time said agreement was executed or while the negotiations were in progress, Watts told them that there was any interlock, and say he told them there was no older title to interfere with the Dillon grant, yet, in view of the distinct statement of Watts that he did tell them, and in view of the fact that the burden of proof is on the appellant to show fraud, if the representations alleged to have been made are to be considered as constituting fraud, we submit that the testimony of Ferguson and Bell are not sufficient to overcome the testimony of Watts, Bell being also a party in interest in the appellant's purchase.

10. But this question is altogether immaterial, as we have above shown, in view of the fact, that before the certificate of title was issued, Ferguson had full information of the interlock, and determined it to be altogether immaterial because of the forfeiture of the R. & E. title. We have only brought this testimony to the attention of the Court in justice to General Watts.

11. Moreover, as Bell does not deny that the conversation given by Watts as having taken place between him and Bell, above referred to, when the 35,000 was paid, a conversation given in full detail by General Watts in his answer, made part of his oral testimony, (Record, 416), but only says he has no recollection of it, and if it took place, it made no impression on him, we respectfully submit that it is to be taken as having taken place, and if this is true, then the fact that no previous information on this subject was given, becomes altogether immaterial, even on the question (*itself immaterial*) whether Watts gave to the repre-

fentatives of Clark the notice of the interlock, which he says he gave.

12. We may add in addition that Watts letter of 1873 to Reeder, (offered in evidence by appellant) heretofore referred to, shows how thoroughly he was satisfied, as far back as 1873, that the R. & E. grant was altogether null; and he testifies that he had, before the sale now in question was made, advised Reeder to this effect. (Record, 425.)

And, therefore, the above mentioned fundamental requirement, that before a representation even of a material fact can furnish any foundation for setting aside a contract, the person making it must have no reasonable ground for believing it to be as represented, has not been met.

G.

While it is no way material to the appellee's case, yet it is not out of the way, as illustrating the want of good faith on the part of the appellant in the beginning and prosecution of this litigation for us to call the attention of the Court to the fact that *no where in the pleadings in this case* and no where in the testimony of any witnesses for the appellant (lawyers, though they be) is it alleged or suggested thar the Rutter and Etting title is *good and valid*, as against Reeder with his possessions and claims under the Dillon title.

Of the many attorneys who have examined this title, not one attempts to pronounce it as having any force or efficacy as against the appellee's title to the Dillon survey; Reeder's attorney, as has been mentioned, always assuring him that his title was good and valid as against Rutter and Etting.

C. C. Watts, at the time of making this contract Attorney General of the State of West Virginia, so considered it.

Judge Evermont Ward, who had himself previously been the owner of the Dillon title and familiar with land titles in that section of the country, as well as Judge of that Circuit, declared the Dillon title to be good and valid.

Samuel A. Miller, a prominent lawyer, especially in land titles, of the Charleston Bar, (Record, pages 108, 113, 145, 417, did the

same. H. M. Bell and his partner, R. H. Catlett, themselves lawyers, and interested in the purchase in controversy in this case, and Mr. Bell, advised of the fact of the conflict, before he had authorized his principal, the appellant, to pay the $35,000, considered it satisfactory.

Judge D. E. Johnson, judge of the Circuit Court of the counties in which this land is located, himself a party in the purchase wtth Bell & Catlett and Clark and others, who is also the judge before whom this suit was originally instituted, and who, when dealing in land in his own vicinity, must be supposed to know something in reference to such title, though not called as a witness, does not suggest any such defect.

It may be fairly assumed that if there were any strength in the objection to the Rutter & Etting title, now set up, some of these parties would have gone upon the stand to show the fact.

II.

Moreover, it was ascertained by the report of the special master appointed in pursuance of the opinion of Mr. Justice Harlan, that the only portion of the whole of the Dillon survey now in the possession of persons claiming title adverse to Reeder, is 7,397 75-100 acres, out of a total in said tract of 54,970 5-10 acres. Though the appellee, by his exceptions, claimed that there should be deducted 697 acres, and the appellant claimed that there should be added 1,997 acres, yet these respective contentions were afterwards abandoned, and the said 7,397 was by the final decree in this case ascertained to be the number of acres actually held by a better title than that of Reeder, by reason of adverse title and possession; for these the appellant is not to pay, whether the title of those holding is good or bad, in accordance with the express terms of the contract of February 29, 1884.

So that after all this litigation, conducted on the theory that by reason of the *existence at one time* of what is known as the Ruttter and Etting grant, the appellant should be released from a contract *consummated* as to its binding force by the payment of the $35,000, after he had *full knowledge of the relation of the Rutter and Etting grant to his purchase* and had been advised by his attorney, fully experienced and capable to pass on the ques-

tion, to whom the question was advisedly and deliberately left, that the Rutter and Etting title was altogether null and cast no cloud on his title, which was certified to be *good and valid*, the final result shows that no one is in possession, claiming title to any portion of the whole tract, except 7,397 acres thereof, and that there remains for him to take 47,572 acres, with no one about to dispute his title, and as to which his said attorney advised him in his certificate of March 21, 1884, before he paid the $35,000, that his title was good and valid, "Reeder and those under whom he claims having been in possession thereof for nearly twenty-five years."

Mr. Justin Harlan, before the exact numbers of acres thus held by persons in possession, and claiming by adverse title and possession as against Reeder, had been ascertained by the proceedings before the master which he ordered, said:

> "I have examined the proof, and to my surprise, and contrary to the impression I got at the oral argument, it does not appear that any very large part of these lands (outside of what is held by junior patentees in possession) is held by a better title than Reeder's, 'by reason of adverse title and possession.'
>
> "The utmost shown is that most of the Dillon survey is within the lines of the Rutter-Etting survey; but, as already said, this might be true, and yet Reeder's right be the better in law. Can it be a sufficient ground to set aside the contract for the plaintiff to show that a large part of the lands in question are within the lines of a patent older than the one under which Reeder claims and that they are claimed adversely to Reeder, especially when Reeder only agreed to convey with special warranty and when the plaintiff agreed to pay for all the lands covered by the Sarver survey, except such as were shown by a survey had, at his expense, to be held 'by adverse title and possession,' constituting a better title than Reeder's? I think not."

Second Part of the Case.

The right of the Appellee to a Decree for the sale of the land.

All that we need say on this subject, is to quote from the opinion of Mr. Justiin Harlan in this case. (Record, 455.

"The next question to be considered is whether Reeder is entitled to the relief asked in his cross-bill, namely a decree for the sale of the lands in question to raise such sum as may be due him, as the balance of the purchase money.

"If the views already expressed are sound, a decree in favor of the defendant, Reeder, on his cross-bill will necessarily follow."

As heretofore stated, the Court directed the ascertainment, through a special master of the number of acres of land, within the exterior boundaries of the Dillon survey, as run by Sarver, to which there is shown to be a better title than Reeder's, "by reason of adverse title and possession;" said ascertainment to include not only such as are in possession of junior patentese, holding by a better right than Reeder, but also such lands as are within both the Dillon and Rutter Etting surveys, and are in the possession of those [illegible] title under the Rutter-Etting patent and who, by reason of such titles and *posseseion*, have a better right than Reeder; the opinion further directed that the amount of purchase money due to the appellee, should be ascertained by deducting the above-mentioned acres from the total number in the Dillon tract, and multiplying the remainder by one dollar and seventy cents ($1.70.)

As heretofore stated, the final decree was settled in accordance with these principles; for final decree, see Record, 608 to 612; for opinion of Mr. Justice Harlan, see Record, 449 to 455; for interlocutory order thereunder, see Record, 448.

It will be noted that there is no assignment of error questioning the correctness of the computation of the number of acres held by persons claiming better title thereto than that of Reeder, "by reason of adverse title and possession."

We respectfully submit that the decree of the Court below should be affirmed.

BERNARD CARTER,
JAMES McCOLGAN.
Solicitors for Appellee.

(158-53

158-53

Original.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

IN RE MOTION OF JOHN M. QUARLES, SR., AND DAVID BUTLER FOR LEAVE TO FILE PETITION FOR WRIT OF *HABEAS CORPUS*.

COPY OF RECORD.

W. C. GLENN,
D. W. ROUNTREE,
For Movants.

UNITED STATES OF AMERICA,
Northern District of Georgia.

United States Circuit Court, March Term, 1895.

First Count.

We, the grand jurors of the United States, chosen, selected, and sworn in and for the northern district of Georgia, upon our oaths do present that James A. McEntire, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, together with divers other evil-disposed persons to the grand jurors unknown, late of said northern district of Georgia and within said district and within the jurisdiction of the court, on the seventh day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there unlawfully, wrongfully, fraudulently, and feloniously combine, confederate, conspire, and agree together between and among themselves and with said other evil-disposed persons unknown to the grand jurors aforesaid to injure, oppress, threaten, and intimidate one Henry Worley, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States and because of his having exercised the same, in that he, the said Henry Worley, on the nineteenth day of March, in the year of our Lord one thousand eight hundred and ninety-four, had reported to and informed W. J. Duncan, a United States deputy marshal in and for said northern district of Georgia, that Bradley Thornton and Thomas McIntyre did, on the fifteenth day of February, in the year of our Lord one thousand eight hundred and ninety-four, within said district, violate the internal-revenue law of the United States by carrying on the business of a distiller without having given bond as required by law. The said conspiracy hereinbefore charged was formed by the said James A. McIntyre, James A. Dickinson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, together with said other evil-disposed persons to the grand jurors unknown, for the purpose of injuring, oppressing, threatening, and intimidating the said Henry Worley because of his having exercised said right and privilege secured to him as aforesaid in reporting to and informing said J. W. Duncan, deputy marshal as aforesaid, of the viola-

tion of the internal-revenue laws as aforesaid by the said Bradley Thornton and Thomas McIntyre; and in furtherance of said conspiracy so formed as aforesaid and for the purpose aforesaid and to effect the object thereof the said James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, together with other evil-disposed persons to the grand jurors unknown, on said seventh day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there, within said district and within the jurisdiction of said court, in the night-time and in disguise, go to the home of Henry Worley, in said northern district of Georgia, and did then and there take him, the said Henry Worley, from his house and did beat, bruise, and otherwise ill-treat him, the said Henry Worley, and did then and there hang him, the said Henry Worley, by the neck, and did then and there shoot at him, the said Henry Worley, with guns and pistols loaded with powder and leaden balls, the same being weapons likely to produce death, because he, the said Henry Worley, had reported to W. J. Duncan, deputy marshal as aforesaid, one Thomas McIntyre and Bradley Thornton for having violated the internal-revenue laws of the United States on the day and date aforesaid, in that they, the said Thomas McIntyre and Bradley Thornton, had engaged in carrying on the business of a distiller within said district without having given bond as required by law, contrary to law. The said Thomas McIntyre and Bradley Thornton in carrying on the business of a distiller as aforesaid did then and there violate the revenue laws of the United States. The said W. J. Duncan at the time of the reporting aforesaid was a United States deputy marshal in and for said northern district of Georgia. The said Henry Worley in reporting said violation of the internal-revenue laws was then and there in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States. All of the aforesaid wrongs and injuries were done to him by said James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, with other evil-disposed persons to the grand jurors unknown, on account of and because he, the said Henry Worley, had exercised the right and privilege secured to him by the Constitution and laws of the United States in informing and reporting the violation of the internal-revenue law by Bradley Thornton and Thomas McIntyre to W. J. Duncan, deputy marshal aforesaid; and in furtherance of said conspiracy and

to effect the object thereof the said James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, James Ramsey, David Johnson, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, together with divers other evil-disposed persons to the grand jurors unknown, being then and there persons of sound memory and discretion, while in the execution of said unlawful conspiracy among themselves and with each other and with other evil-disposed persons to the grand jurors unknown, on the seventh day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there, within said district and within the jurisdiction of said court, with force and arms unlawfully, willfully, maliciously, wrongfully and feloniously, and with malice aforethought assault him, the said Henry Worley, with deadly weapons, to wit, with guns and pistols loaded with gunpowder and leaden balls, the same being weapons likely to produce death, and did then and there discharge the said loaded guns and pistols at him, the said Henry Worley, who was then and there a citizen of the United States and a human being in the peace of the United States and in the peace of the State of Georgia, with intent then and there him, the said Henry Worley, to kill and murder for the causes aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Second Count.

And the grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the United States of America, do further present that James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, together with divers other evil-disposed persons to the grand jurors unknown, late of said northern district of Georgia and within said district and within the jurisdiction of the court, on the seventh day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there unlawfully, wrongfully, fraudulently, and feloniously combine, confederate, conspire, and agree together between and among themselves and with said other evil-disposed persons unknown to the grand jurors, as aforesaid, to injure, oppress, threaten, and intimidate one Henry Worley, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States and because of his having exercised the same, in that he, the said Henry Worley, on the twenty-fifth day of March,

in the year of our Lord one thousand eight hundred and ninety-four, had reported to and informed W. J. Duncan, a United States deputy marshal in and for said northern district of Georgia, that Charley Hyde did on the nineteenth day of March, in the year of our Lord one thusand eight hundred and ninety-four, within said district, violate the internal-revenue laws of the United States by carrying on the business of a distiller without having given bond as required by law. The said conspiracy hereinbefore charged was formed by the said James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, together with said other evil-disposed persons to the grand jurors unknown, for the purpose of injuring, oppressing, threatening, and intimidating the said Henry Worley because of his having exercised said right and privilege secured to him as aforesaid in reporting and informing said W. J. Duncan, deputy marshal as aforesaid, of the violation of the internal-revenue laws as aforesaid by the said Charley Hyde; and in furtherance of said conspiracy so formed as aforesaid and for the purpose aforesaid, and to effect the object thereof, the said James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, together with other evil-disposed persons to the grand jurors unknown, on said seventh day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there, within said district and within the jurisdiction of said court, in the nighttime and in disguise, go to the house of said Henry Worley, in the said northern district of Georgia, and did then and there take him, the said Henry Worley, from his house and did beat, bruise, and otherwise ill-treat him, the said Henry Worley, and did then and there hang him, the said Henry Worley, by the neck, and did then and there shoot at him, the said Henry Worley, with guns and pistols loaded with powder and leaden balls, the same being weapons likely to produce death, because he, the said Henry Worley, had reported to W. J. Duncan, deputy marshal as aforesaid, one Charley Hyde for having violated the internal-revenue laws of the United States on the day and date aforesaid, in that he, the said Charley Hyde, had engaged in carrying on the business of a distiller without having given bond as required by law, contrary to law, the said Charley Hyde, in carrying on the business of a distiller as aforesaid, did then and there violate the revenue laws of the United States. The said W. J. Duncan at the time of the reporting aforesaid was a United States deputy marshal in and for

said northern district of Georgia. The said Henry Worley, in reporting said violation of the internal-revenue laws, was then and there in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States. All of the aforesaid wrongs and injuries were done to him by said James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, with other evil-disposed persons to the grand jury unknown, on account of and because he, the said Henry Worley, had exercised the right and privilege secured to him by the Constitution and laws of the United States, in informing and reporting the violation of the internal-revenue laws by Charley Hyde to W. J. Duncan, deputy marshal aforesaid; and in furtherance of said conspiracy, and to effect the object thereof, the said James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, James Ramsey, David Johnson, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, together with divers other evil-disposed persons to the grand jurors unknown, being then and there persons of sound memory and discretion, while in the execution of said unlawful conspiracy among themselves and with each other and other evil-disposed persons to the grand jurors unknown, on the seventh day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there, within said district and within the jurisdiction of said court, with force and arms unlawfully, willfully, maliciously, wrongfully, and feloniously and with malice aforethought assault him, the said Henry Worley, with deadly weapons, to wit, with guns and pistols loaded with powder and leaden balls, the same being weapons likely to produce death, and did then and there discharge the said loaded guns and pistols at him, the said Henry Worley, who was then and there a citizen of the United States and a human being in the peace of the United States and in the peace of the State of Georgia, with intent then and there him, the said Henry Worley, to kill and murder for the causes aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Third Count.

And the grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the United States of America, do further present that James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson,

James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, together with divers other evil-disposed persons to the grand jurors unknown, late of said northern district of Georgia, and within said district and within the jurisdiction of the court, on the seventh day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there unlawfully, wrongfully, fraudulently, and feloniously combine, confederate, conspire, and agree together between and among themselves and with said other evil-disposed persons unknown to the grand jurors as aforesaid, to injure, oppress, threaten, and intimidate one Henry Worley, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States, and because of his having exercised the same, in that he, the said Henry Worley, on the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and ninety-four, had reported to and informed W. J. Duncan, a United States deputy marshal in and for said northern district of Georgia, that James Bell did on the nineteenth day of March, in the year of our Lord one thousand eight hundred and ninety-four, within said district, violate the internal-revenue laws of the United States by carrying on the business of a distiller without having given bond as required by law. The said conspiracy hereinbefore charged was formed by the said James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, together with said other evil-disposed persons to the grand jurors unknown, for the purpose of injuring, oppressing, threatening, and intimidating the said Henry Worley because of his having exercised said right and privilege secured to him as aforesaid, in reporting and informing said W. J. Duncan, deputy marshal as aforesaid, of the violation of the internal-revenue laws as aforesaid by the said James Bell; and in furtherance of said conspiracy so formed as aforesaid and for the purpose aforesaid, and to effect the object thereof, the said James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, together with other evil-disposed persons to the grand jurors unknown, on said seventh day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there, within said district and within the jurisdiction of said court, in the night-time and in disguise, go to the house of said

Henry Worley, in the said northern district of Georgia, and did then and there take him, the said Henry Worley, from his house, and did beat, bruise, and otherwise ill-treat him, the said Henry Worley, and did then and there hang him, the said Henry Worley, by the neck, and did then and there shoot at him, the said Henry Worley, with guns and pistols loaded with powder and leaden balls, the same being weapons likely to produce death, because he, the said Henry Worley, had reported to W. J. Duncan, deputy marshal as aforesaid, one James Bell for having violated the internal-revenue laws of the United States, on the day and date aforesaid, in that he, the said James Bell, had engaged in carrying on the business of a distiller without having given bond as required by law, contrary to law, the said James Bell in carrying on the business of a distiller as aforesaid did then and there violate the revenue laws of the United States. The said W. J. Duncan at the time of the reporting aforesaid was a United States deputy marshal in and for said northern district of Georgia. The said Henry Worley in reporting said violation of the internal-revenue laws was then and there in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States. All of the aforesaid wrongs and injuries were done to him by said James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, with other evil-disposed persons to the grand jurors unknown, on account of and because he, the said Henry Worley, had exercised the right and privilege secured to him by the Constitution and laws of the United States in informing and reporting the violation of the internal-revenue law by James Bell to W. J. Duncan, deputy marshal aforesaid, and, in furtherance of said conspiracy and to effect the object thereof, the said James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, James Ramsey, David Johnson, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, together with divers other evil-disposed persons to the grand jurors unknown, being then and there persons of sound memory and discretion, while in the execution of said unlawful conspiracy among themselves and with each other and other evil-disposed persons to the grand jurors unknown, on the seventh day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there, within said district and within the jurisdiction of said court, with force and arms unlawfully, willfully, maliciously, wrongfully, and feloniously and with malice aforethought assault him, the said Henry Worley, with deadly weapons, to wit, with guns and pistols loaded with

powder and leaden balls, the same being weapons likely to produce death, and did then and there discharge the said loaded guns and pistols at him, the said Henry Worley, who was then and there a citizen of the United States and a human being in the peace of the United States and in the peace of the State of Georgia, with intent then and there him, the said Henry Worley, to kill and murder for the causes aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Fourth Count.

And the grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the United States of America, do further present that James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, together with divers other evil-disposed persons to the grand jurors unknown, late of said northern district of Georgia and within said district and within the jurisdiction of the court, on the seventh day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there unlawfully, wrongfully, fraudulently, and feloniously combine, confederate, conspire, and agree together between and among themselves and with said other evil-disposed persons unknown to the grand jurors as aforesaid to injure, oppress, threaten, and intimidate one Henry Worley, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States and because of his having exercised the same, in that he, the said Henry Worley, on the nineteenth day of March, in the year of our Lord one thousand eight hundred and ninety-four, had reported and informed W. J. Duncan, a United States deputy marshal in and for said northern district of Georgia, that George Terry did, on the nineteenth day of March, in the year of our Lord one thousand eight hundred and ninety-four, within said district, violate the internal-revenue laws of the United States by carrying on the business of a distiller without having given bond as required by law. The said conspiracy hereinbefore charged was formed by the said James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, together with said other evil-disposed persons to the grand jurors unknown, for the purpose of injuring, oppressing, threatening, and intimidating the said Henry Worley

because of his having so exercised said right and privilege secured to him as aforesaid in reporting and informing said W. J. Duncan, deputy marshal as aforesaid, of the violation of the internal-revenue laws as aforesaid by the said George Terry; and in furtherance of said conspiracy so formed as aforesaid and for the purpose aforesaid, and to effect the object thereof, the said James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, together with other evil-disposed persons to the grand jurors unknown, on said seventh day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there, within said district and within the jurisdiction of said court, in the night-time and in disguise, go to the house of said Henry Worley, in the said northern district of Georgia, and did then and there take him, the said Henry Worley, from his house, and did beat, bruise, and otherwise ill-treat him, the said Henry Worley, and did then and there hang him, the said Henry Worley, by the neck, and did then and there shoot at him, the said Henry Worley, with guns and pistols loaded with powder and leaden balls, the same being weapons likely to produce death, because he, the said Henry Worley, had reported to W. J. Duncan, deputy marshal as aforesaid, one George Terry for having violated the internal-revenue laws of the United States on the day and date aforesaid, in that he, the said George Terry, had engaged in carrying on the business of a distiller without having given bond as required by law, contrary to law, the said George Terry, in carrying on the business of a distiller as aforesaid, did then and there violate the revenue laws of the United States. The said W. J. Duncan at the time of the reporting aforesaid was a United States deputy marshal in and for said northern district of Georgia. The said Henry Worley, in reporting said violation of the internal-revenue laws, was then and there in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States. All of the aforesaid wrongs and injuries were done to him by said James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, with other evil-disposed persons to the grand jurors unknown, on account of and because he, the said Henry Worley, had exercised the right and privilege secured to him by the Constitution and laws of the United States in informing and reporting the violation of the internal-revenue law by George Terry to W. J. Duncan, deputy marshal aforesaid; and in furtherance of said conspiracy, and to

effect the object thereof, the said James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, James Ramsey, David Johnson, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, together with divers other evil-disposed persons to the grand jurors unknown, being then and there persons of sound memory and discretion, while in the execution of said unlawful conspiracy among themselves and with each other and with other evil-disposed persons to the grand jurors unknown, on the seventh day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there, within said district and within the jurisdiction of said court, with force and arms unlawfully, willfully, maliciously, wrongfully and feloniously, and with malice aforethought ass-ult him, the said Henry Worley, with deadly weapons, to wit, with guns and pistols loaded with gunpowder and leaden balls, the same being weapons likely to produce death, and did then and there discharge the said loaded guns and pistols at him, the said Henry Worley, who was then and there a citizen of the United States and a human being in the peace of the United States and in the peace of the State of Georgia, with intent then and there him, the said Henry Worley, to kill and murder for the causes aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Fifth Count.

And the grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the United States of America, do further present that the said James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, together with divers other evil-disposed persons to the grand jurors unknown, late of said northern district of Georgia, within said district and within the jurisdiction of said court, on the seventh day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there unlawfully, wrongfully, fraudulently, and feloniously combine, confederate, conspire, and agree together between and among themselves and with said other evil-disposed persons to the grand jurors unknown to injure a witness in his person, to wit, Henry Worley, who was then and there a citizen of the United States and a witness, on account of his having attended a court of the United States as a witness and on account of his having testified in a matter therein pending freely, fully, and truthfully in behalf of the United States of America in a case then and there pending

of the United States against James Higgins, charged with carrying on the business of a distiller without having given bond as required by law and with working in a distillery on which no sign was placed and kept, exhibiting in plain and legible letters not less than three inches in length, painted in oil colors or gilded and of a proper and proportionate width, the name or firm of the distiller with the words "registered distillery" as required by law, on the twentieth day of March, in the year of our Lord one thousand eight hundred and ninety-four, before H. C. Hamilton, a United States circuit court commissioner in and for said northern district of Georgia—that is to say, that on the twentieth day of March, in the year of our Lord one thousand eight hundred and ninety-four, Henry Worley, who was then and there a citizen of the United States, appeared before H. C. Hamilton, a United States circuit court commissioner in and for the northern district of Georgia, as a witness in the case then and there pending before said commissioner, who was then and there holding a United States court, in the trial of the United States against James Higgins, charged with carrying on the business of a distiller without having given bond as required by law and with working in a distillery on which no sign was placed and kept, exhibiting in plain and legible letters not less than three inches in length, painted in oil colors or gilded and of a proper and proportionate width, the name or firm of the distiller with the words "registered distillery" as required by law, the said H. C. Hamilton then and there holding a commissioner's court to investigate said charge against said Higgins, the same being a court of the United States. Said Henry Worley was then and there sworn as a witness for the United States in said case, and after taking said oath and after appearing as a witness in said case as aforesaid did then and there testify freely, fully, and truthfully about and concerning the matter therein pending; and on account of said Henry Worley having so appeared as a witness and testified in said case as aforesaid the said James McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, with said other evil-disposed persons to the grand jurors unknown, on the said seventh day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there unlawfully, wrongfully, feloniously, conspire together and with each other and with said other evil-disposed persons to the grand jurors unknown to injure said Henry Worley in his person for the causes aforesaid; and in furtherance of said conspiracy and to effect the object thereof did, on the day and date aforesaid, within said district and within the jurisdiction of said court, in the nighttime and in disguise, go to the house of said Henry Worley and did then and there take the said Henry Worley by force from his house, and did then and there unlawfully beat, bruise,

wound, and otherwise ill treat him, the said Henry Worley, and did then and there unlawfully hang him, the said Henry Worley, by the neck, and did then and there shoot at him, the said Henry Worley, with guns and pistols loaded with powder and leaden balls, the same being weapons likely to produce death. All of the said several wrongs and injuries the said James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, Dave Morrison, James Ramsey, Dave Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, together with other evil-disposed persons to the grand jurors unknown, then and there did to and upon the person of him, the said Henry Worley, because he, the said Henry Worley, had attended the United States court as aforesaid and had testified therein freely, fully, and truthfully in said case then and there pending in said court, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Sixth Count.

And the grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the United States of America, do further present that the said James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Phipps, *H*ohn Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, together with divers other evil-disposed persons to the grand jurors unknown, late of said northern district of Georgia, within said district and within the jurisdiction of said court, on the seventh day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there unlawfully, wrongfully, fraudulently, and feloniously combine, confederate, conspire, and agree together between and among themselves and with other evil-disposed persons to the grand jurors unknown to injure a witness in his person, to wit, Henry Worley, who was a citizen of the United States, on account of his having attended a court of the United States as a witness and on account of his having testified to a matter therein pending freely, fully, and truthfully—that is to say, that on the twentieth day of March, in the year of our Lord one thousand eight hundred and ninety-four, Henry Worley, who was then and there a citizen of the United States, appeared before H. C. Hamilton, a United States circuit court commissioner in and for said northern district of Georgia, as a witness in the case then and there pending of the United States against James Higgins, charged with carrying on the business of a distiller without having given bond as required by law and with working in a distillery on which no sign was placed and kept ex-

hibiting in plain and legible letters not less than three inches in length, painted in oil colors or gilded and of a proper and proportionate width, the name or firm of the distiller, with the words "registered distillery," as required by law, the said H. C. Hamilton then and there holding a commissioner's court to investigate said charge against said Higgins, the same being a court of the United States. The said Henry Worley was then and there sworn as a witness for the United States in said case, and after taking said oath and after appearing as a witness in said case as aforesaid did then and there testify freely, fully, and truthfully about and concerning the matter therein pending, and on account of the said Henry Worley having so appeared as a witness and testified in said case as aforesaid said James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, with said other evil-disposed persons to the grand jurors unknown, on the said seventh day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there unlawfully, wrongfully, and feloniously conspire together and with each other and with other persons to the grand jurors unknown to injure said Henry Worley in his persons, and in furtherance of said conspiracy, and to effect the object thereof, did on the day and date aforesaid, within said district and within the jurisdiction of said court, in the night-time and in disguise, go to the house of said Henry Worley, and did then and there take the said Henry Worley from his house, and did then and there beat, bruise, wound, and otherwise ill-treat him, the said Henry Worley, and did then and there hang him, the said Henry Worley, by the neck, and did then and there shoot at him, the said Henry Worley, with guns and pistols loaded with powder and leaden balls, the same being weapons likely to produce death. All of the said several wrongs and injuries the said James A. McIntyre, James A. Dickson, W. C. D. Gordon, Merrill Woods, Hardy Fipps, John Quarles, Sr., J. W. Redd, W. R. Morrison, J. M. Morrison, Frank Gilbert, Bob Anderson, James McCutchen, Harris Bramlett, T. M. Wright, Green Morrison, J. T. Burgess, Bradley Thornton, Huse Nelson, Dick Bramlett, David Johnson, James Ramsey, David Butler, Tobe Smith, James Parsons, George Hartsell, and John Bowers, together with the other evil-disposed persons to the grand jurors unknown, then and there did to the said Henry Worley because he, the said Henry Worley, had attended the United States court as aforesaid and testified therein freely, fully, and truthfully in said case pending in said court, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

A true bill.

April 2d, 1895. CLARENCE KNOWLES, *Foreman.*

J. S. JAMES, *U. S. Attorney.*

Filed in clerk's office April 2d, 1895.

O. C. FULLER,
Clerk U. S. C.

[Endorsed:] No. 4464. United States circuit court, northern district of Georgia, March term, 1895. United States *vs.* James McCutchen *et al.* Conspiracy, vio. sec. 5508 & '9 & 5406 of Murray county. (Conspiracy.) A true bill. 2 day of April, 1895. Clarence Knowles, foreman. Filed in office April 2d, 1895. O. C. Fuller, clerk U. S. C., per —— ——, deputy clerk. Witnesses sworn before grand jury: Solomon O'Kelly, Harris Bramlett, James A. Dickson, J. M. Morrison, Wm. Mitchell, Dr. E. O. Stafford, Dora Thomsen, Tom McEntyre, Base Bramlett, of —— county.

Circuit Court of the United States for the Northern District of Georgia.

UNITED STATES *vs.* JAMES MCENTYRE *et al.* — No. 4464. March Term, 1895. Conspiracy, Violating Sections 5508, 5509, and 5406, Revised Statutes of the United States.

I. And now comes John Quarles, Sr., and David Butler, in his own proper person, into court, and having heard the said indictment read says that the said indictment and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that *he*, the said John Quarles, Sr., and David Butler, *is* not bound by the law of the land to answer the same; and this *he is* ready to verify. Wherefore and for want of sufficient indictment in this behalf the said John Quarles, Sr., and David Butler prays judgment, and that by the court *he* may be dismissed and discharged from said premises in the said indictment specified.

II. And each and all of the above-named demurrants specially demur to the first count in said indictment and pray to be discharged from any answer thereon for the following causes, which are assigned as distinct and separate causes of demurrer to the said first count:

First. Because the right and privilege alleged as the right and privilege of a citizen of the United States is not one secured by the Constitution and laws of the United States; 2nd, because there is no such right and privilege secured to the citizens of the United States, as such citizens, as that set out in the said first count; 3rd, because there is no allegation of the time when or the place where one Thomas McEntyre and Bradley Thornton had engaged in the business of a distiller, nor is there any sufficient allegation of the guilt of the said Thomas McEntyre and Bradley Thornton of any violation of the internal-revenue laws, nor is any specification given so as to make the same a traversible fact in the trial of this case; 4th, because the charge as to the formation of the conspiracy is not

specific, precise, and definite, and because there is not sufficient allegation as to the manner and circumstances of the formation of the same; seventh, because there is no offense charged in the said first count of which the courts of the U. S. can have or take cognizance; eighth, because there is no sufficient charge of the offense of ass-ult with intent to murder in the perpetration of the conspiracy as required by law.

III. And each and all of the above-named demurrants demur to the second count in the said indictment and pray to be discharged from any answer thereon for the following causes, which are assigned as distinct and separate causes of demurrer to the said second count: 1st, because the right and privilege alleged as the right and privilege of a citizen of the United States is not one secured by the Constitution and laws of the United States; 2nd, because there is no such right and privilege secured to the citizens of the United States as such citizens as that set out in the said second count; 3rd, because there is no allegation of the time when or the place where one Charley Hyde had engaged in the business of a distiller, nor is there any sufficient allegation of the guilt of the said Charley Hyde of any violation of the internal-revenue laws, nor is any specification given so as to make the same a traversible fact in the trial of this case; 4th, because the charge as to the formation of the conspiracy is not specific, precise, and definite, and because there is no sufficient allegation as to the manner and circumstances of the formation of the same; seventh, because there is no offense charged in the said second count of which the courts of the U. S. can have or take cognizance; eighth, because there is no sufficient charge of the offense of assault with intent to murder in the perpetration of the conspiracy as required by law.

IV. And each and all of the above-named demurrants specially demur to the third count in the said indictment and pray to be discharged from any answer thereon for the following causes, which are assigned as distinct and separate causes of demurrer to the said third count: 1st, because the right and privilege alleged as the right and privilege of a citizen of the United States is not one secured by the Constitution and laws of the United States; 2nd, because there is no such right and privilege secured to the citizens of the United States as such citizens as that set out in the said third count; 3rd, because there is no allegation of the time when or the place where one James Bell had engaged in the business of a distiller, nor is there any sufficient allegation of the guilt of the said James Bell of any violation of the internal-revenue laws, nor is any specification given so as to make the same a traversible fact in the trial in this case; 4th, because the charge as to the formation of the conspiracy is not specific, precise, and definite, and because there is no sufficient allegation as to the manner and circumstances of the formation of the same; 6th, because there is no offense charged in the said third count of which the courts of the United States can have or take cognizance; 6th, because there is no sufficient charge of the offense of assault with intent to murder in the perpetration of the conspiracy as required by law.

V. And each and all of the above-named demurrants specially demur to the fourth count in the said indictment and pray to be discharged from any answer thereon for the following causes, which are assigned as separate and distinct causes of demurrer to the said fourth count: 1st, because the right and privilege alleged as the right and privilege of a citizen of the United States is not one secured by the Constitution and laws of the United States; 2nd, because there is no such right and privilege secured to the citizens of the United —, as such citizens, as that set out in the said fourth count; 3rd, because there is no allegation of the time when or the place where one George Terry had engaged in the business of a distiller, nor is there any sufficient allegation of the guilt of the said George Terry of any violation of the internal-revenue laws, nor is there any specification given so as to make the same a traversible fact in the trial of this case; 4th, because the charge as to the formation of the conspiracy is not specific, precise, and definite, and because there is no sufficient allegation as to the manner and circumstances of the formation of the same; 5, because there is no offense charged in the said fourth count of which the courts of the United States can have or take cognizance; 6th, because there is no sufficient charge of the offense of assault with intent to murder in the perpetration of the conspiracy as required by law.

To the 5th count of the indictment each and all of the above-named demurrants specially demur and assign for special cause of demurrer as follows, to wit: First, that the United States circuit court commissioner does not hold a court of the United States, nor is the same a court within the meaning of the 5406th section of the Revised Statutes; second, that there is no such thing as a commissioner's court under the laws of the United States; third, because section 5406 has no application to the facts stated in the said indictment; fourth, because there is no such right and privilege secured by the Constitution and laws of the United States as that specified in the said 5th count; fifth, because the conspiracy alleged and charged is so vaguely and indistinctly charged as to be insufficient in law; sixth, because there is no sufficient allegation of the crime of assault with intent to murder set forth in the said count; seventh, because there is no crime or offense of which the courts of the United States can take cognizance charged in the said count.

To the 6th count of the said indictment each and all of the above-named demurrants specially demur and assign for special cause of demurrer as follows: First, that section 5406 has no application to witnesses before a U. S. commissioner; second, that a circuit court commissioner does not hold a court of the U. S.; third, because the conspiracy charged is so indefinite in its description as to be insufficient in law; fourth, that no offense is charged of which the courts of the U. S. can take cognizance.

Each and all of the above-named defendants specially demur to the above indictment and for cause of demurrer say that neither in the first, second, third, fourth, fifth, nor sixth counts of the said

indictment is there any offense charged whereof the courts of the U. S. can take cognizance.

Wherefore for each and all of the above causes defendants pray that they may be discharged and go hence without a day.

GLENN & ROUNTREE,
T. F. GREER,
J. E. ROBINSON,
Def'ts' Att'ys.

Filed in clerk's office April 8, 1895.

O. C. FULLER, *Clerk.*

UNITED STATES *vs.* JAMES McENTIRE *et al.*) No. 4464. Conspiracy, Violation Sections 5508–9 & 5406 of the Revised Statutes.

Upon considering the demurrer this day filed on behalf of the defendants John Quarles, Sr., & David Butler, it is adjudged by the court that the demurrer to the indictment, so far as the first four counts in the indictment *is* concerned, is not well founded in law, & that the same as to these four counts be overruled.

So far as the two last counts are concerned it is adjudged that the same is well founded in law, & demurrer as to them is sustained.

Open court, April 8, 1895.

WM. T. NEWMAN,
U. S. Judge.

The defendants except to the overruling of this demurrer to the first four counts of the indictment. The exception is allowed to be filed and noted by the court.

Open court, April 8, 1895.

WM. T. NEWMAN,
U. S. Judge.

Filed in clerk's office April 8, 1895.

O. C. FULLER, *Clerk,*
By J. D. STEWARD, *Deputy.*

Plea of Not Guilty.

The defendants John Quarles, Sr., and David Butler, being formerly arraigned, plead not guilty.

In open court, this 9th day of April, 1895.

O. C. FULLER, *Clerk.*

Verdict of the Jury.

We, the jury, find the defendants John Quarles, Sr., and David Butler guilty.

This 13th day of April, 1895.

E. E. FREEMAN, *Foreman.*

In the Circuit Court of the United States for the Northern District of Georgia.

UNITED STATES *vs.* JAS. A. McENTIRE *et al.* } Violating Sections 5508 and 5509 of the Revised Statutes of the United States.

Come now the defendants John Quarles, Sr., and David Butler, against whom a verdict of guilty in the above-stated case has been rendered, and move the court to arrest the judgment on the verdict in said case for the following reasons, to wit:

1. Because in said indictment there is no allegation that Wm. J. Duncan was an officer of the United States and charged with the enforcement of the internal-revenue laws, nor is there any allegation that the said Wm. J. Duncan was authorized to take information upon such subject or to employ persons for the service of the United States.

2. Because there is no allegation that Henry Worley was in the service or employment of the United States.

3. Because there is no such official as a United States deputy marshal, as charged in the indictment.

4. Because there is no such right and privilege secured by the Constitution and laws of the United States, within the meaning of sections 5508 and 5509 of the Revised Statutes of the U. S., as that set out in the indictment.

5. Because there is no crime or offense charged in the said bill of indictment of which the courts of the United States have jurisdiction.

Wherefore they file this motion and pray that judgment upon the said verdict may be arrested and that they go hence without a day.

GLENN & ROUNTREE,
J. E. ROBINSON,
Counsel for Movants.

Open court, April 15th, 1895.—Let this motion be filed and the same served on the district attorney of the United States. Let the district attorney show cause before me as soon as counsel can be heard why the motion should not be sustained and the judgment arrested as prayed for.

WM. T. NEWMAN,
U. S. Judge.

Due and legal service of the within and foregoing motion in arrest of judgment and order thereon is acknowledged.
April 15, 1895.

J. S. JAMES,
U. S. Attorney.

Filed in clerk's office April 15, 1895.

O. C. FULLER, *Clerk.*

This motion coming on to be heard in open court today, and after hearing and considering the same, it is considered and adjudged by the court that this motion in arrest of judgment be, and the same is hereby, overruled.

April 16, 1895.

WM. T. NEWMAN,
U. S. Judge.

The movants come now and except to the judgment overruling this motion, and the exception is allowed and noted by the court.

Open court, April 16, 1895.

WM. T. NEWMAN,
U. S. Judge.

In the Circuit Court of the United States for the Northern District of Georgia.

UNITED STATES *vs.* DAVID BUTLER. } True Bill. Indictment, Conspiracy. Verdict, Guilty.

And it having been in due form determined and ascertained that there is no penitentiary within the northern district of Georgia suitable for the confinement of persons convicted of crimes in the courts of the United States in said northern district of Georgia, and the Attorney General of the United States having in due form and by and with competent authority designated the Ohio penitentiary, at Columbus, in the State of Ohio, as the place of confinement, subsistence, and employment of all persons convicted or who may be hereafter convicted of crimes against the United States of America in said northern district of Georgia, and such designation having been in due form notified to the court and entered upon the record thereof, and the court finding the same to be true—

It is considered, ordered, and adjudged by the court by reason of the verdict herein that the said David Butler be imprisoned in the Ohio penitentiary, at Columbus, in the State of Ohio, for the term of five years; that he pay a fine of five hundred dollars and the cost of prosecution, and that he remain imprisoned in said penitentiary until said fine and costs are paid or until he is otherwise discharged by law.

In open court, this 16th day of April, A. D. 1895.

WM. T. NEWMAN,
U. S. Judge.

[Endorsed:] No. 4464. United States circuit court, northern district of Georgia, March term, 1895. United States *vs.* David Butler. Sentence, 5 years and $500.00 fine. Filed April 16th, 1895. O. C. Fuller, clerk U. S. C. C.

In the Circuit Court of the United States for the Northern District of Georgia.

UNITED STATES *vs.* JOHN QUARLES, SR.	True Bill.	Indictment, Conspiracy. Verdict, Guilty.

And it having been in due form determined and ascertained that there is no penitentiary within the northern district of Georgia suitable for the confinement of persons convicted of crimes in the courts of the United States in said northern district of Georgia, and the Attorney General of the United States having in due form and by and with competent authority designated the Ohio penitentiary, at Columbus, in the State of Ohio, as the place of confinement, subsistence, and employment of all persons convicted or who may be hereafter convicted of crimes against the United States of America in said northern district of Georgia, and such designation having been in due form notified to the court and entered upon the record thereof, and the court finding the same to be true—

It is considered, ordered, and adjudged by the court, by reason of the verdict herein, that the said John Quarles be imprisoned in the Ohio penitentiary, at Columbus, in the State of Ohio, for the term of five years; that he pay a fine of five hundred dollars and the cost of prosecution, and that he remain imprisoned in said penitentiary until said fine and costs are paid or until he is otherwise discharged by law.

In open court this 16th day of April, A. D. 1895.

WM. T. NEWMAN,
U. S. Judge.

[Endorsed:] No. 1464. United States circuit court, northern district of Georgia, March term, 1895. United States *vs.* John Quarles, Sr. Sentence, 5 years and $500 fine. Filed April 16th, 1895. O. C. Fuller, clerk U. S. C. C.

UNITED STATES OF AMERICA, } *ss.:*
Northern District of Georgia, }

I, O. C. Fuller, clerk of the United States circuit court in and for the northern district of Georgia, do hereby certify that the foregoing and attached 33 pages of printing and writing *is* a true, full, correct, and complete copy of the original bill of indictment, demurrer, judgment on demurrer, exceptions to judgment, plea of not guilty, verdict of the jury, motion in arrest of judgment, sentence of David Butler, sentence of John Quarles, Sr., on file and remaining of record in my office in the matter of The United States of America against James A. McEntire, David Butler, and John Quarles, Sr., and others.

Seal U. S. Circuit Court, N. D. Georgia.

In testimony whereof I hereunto set my hand and seal of the said circuit court, at Atlanta, Ga., this the 16th day of April, A. D. 1895.

O. C. FULLER, *Clerk.*

Original.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

IN RE MOTION OF JAMES McENTIRE AND JOHN H. GOBLE FOR LEAVE TO FILE PETITION FOR WRIT OF *HABEAS CORPUS*.

COPY OF RECORD.

W. C. GLENN,
D. W. ROUNTREE,
For Movants.

UNITED STATES OF AMERICA, }
Northern District of Georgia. }

United States Circuit Court, March Term, 1895.

We, the grand jurors of the United States, chosen, selected, and sworn in and for said northern district of Georgia, upon our oaths do present that James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrision, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, together with divers other evil-disposed persons to the grand jurors unknown, late of said northern district of Georgia, within said district and within the jurisdiction of said court, on the nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there unlawfully, wrongfully, fraudulently, and feloniously combine, confederate, conspire, and agree together between and among themselves and with said other evil-disposed persons unknown to the grand jurors as aforesaid to injure, oppress, threaten, and intimidate one Henry Worley, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States and because of his having so exercised the same, in that he, the said Henry Worley, on the nineteenth day of March, in the year of our Lord one thousand eight hundred and ninety-four, had reported to and informed W. J. Duncan, a United States deputy marshal in and for said northern district of Georgia, that Bradley Thornton and Thomas McEntire did on the fifteenth day of February, in the year of our Lord one thousand eight hundred and ninety-four, within said district, violate the internal-revenue laws of the United States by carrying on the business of a distiller without having given bond as required by law, contrary to law. The said conspiracy hereinbefore charged was formed by the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrision, Hawkins Worley, John Edmonson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, with said other evil-disposed persons to the grand jurors unknown, for the purpose of injuring, oppressing, threatening, and intimidating the said Henry Worley because of his having exercised said right and privilege, secured to him as aforesaid, by reporting to and informing said W. J. Duncan, deputy marshal as aforesaid, of the violations of the internal-revenue laws as aforesaid by the said Bradley Thornton and Thomas McEntire; and in furtherance of said conspiracy so formed as aforesaid for the purposes aforesaid, and to effect the object thereof, the said James McEntire,

James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, together with other evil-disposed persons to the grand jurors unknown, on the said nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there, within said district and within the jurisdiction of said court, discharge loaded guns and pistols at him, the said Henry Worley, and did then and there shoot him, the said Henry Worley, said guns and pistols being loaded with powder and leaden balls; the said leaden balls discharged from said guns and pistols as aforesaid did then and there penetrate the head, face, and body of him, the said Henry Worley, and him, the said Henry Worley, did then and there kill, because the said Henry Worley, in the exercise of the right and privilege secured to him by the Constitution and laws aforesaid, had reported to W. J. Duncan, a United States deputy marshal, Bradley Thornton, and Thomas McEntire for having violated the internal-revenue laws of the United States as aforesaid. The said Henry Worley, in reporting said violations of the internal-revenue laws, was then and there in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States; and in furtherance of said conspiracy formed as aforesaid for the purposes aforesaid and as a part thereof, and to effect the object thereof, the said James McIntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, together with other evil-disposed persons to the grand jurors unknown, being then and there persons of sound memory and discretion, while in the execution of said unlawful and felonious conspiracy among themselves and with each other and with other evil-disposed persons to the grand jurors unknown, on the said nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there, within said district and within the jurisdiction of said court, with force and arms unlawfully, wrongfully, willfully, feloniously, and with malice aforethought, with deadly weapons, to wit, with guns and pistols loaded with gunpowder and leaden balls, shoot him, the said Henry Worley, a citizen of the United States and a human being in the peace of the United States and in the peace of the State of Georgia; said leaden balls discharged from said guns and pistols as aforesaid did then and there penetrate the head, face, and other parts of the body of him, the said Henry Worley, and the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, and with other evil-disposed persons to the grand jurors unknown him, the said Henry

Worley, did then and there kill and murder; all of which said several wrongs and injuries the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, with other evil-disposed parties to the grand jurors unknown, to the said Henry Worley then and there did, in pursuance of said conspiracy formed as aforesaid for the purposes as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Second Count.

And the grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the United States of America, do further present that James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, together with divers other evil-disposed persons to the grand jurors unknown, late of said northern district of Georgia, within said district and within the jurisdiction of said court, on the nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there unlawfully, wrongfully, fraudulently, and feloniously combine, confederate, conspire, and agree together between and among themselves and with said other evil-disposed persons unknown to the grand jurors as aforesaid to injure, oppress, threaten, and intimidate one Henry Worley, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States and because of his having so exercised the same, in that he, the said Henry Worley, on the nineteenth day of March, in the year of our Lord one thousand eight hundred and ninety-four, had reported to and informed W. J. Duncan, a United States deputy marshal in and for said northern district of Georgia, that George Terry did on the said nineteenth day of March, in the year of our Lord one thousand eight hundred and ninety-four, within said district, violate the internal-revenue laws of the United States by carrying on the business of a distiller without having given bond as required by law, contrary to law. The said conspiracy hereinbefore charged was formed by the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, with said other evil-disposed persons to the grand jurors unknown, for the purpose of injuring, oppressing, threatening, and intimidating the said Henry Worley because of his having exercised said right and privilege secured to

him as aforesaid by reporting to and informing said W. J. Duncan, who was a deputy marshal as aforesaid, of the violations of the internal-revenue laws as aforesaid by the said George Terry; and in furtherance of said conspiracy so formed as aforesaid for the purposes aforesaid, and to effect the object thereof, the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, together with other evil-disposed persons to the grand jurors unknown, on the said nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there, within said district and within the jurisdiction of said court, discharge loaded guns and pistols at him, the said Henry Worley, and did then and there shoot him, the said Henry Worley, said guns and pistols being loaded with powder and leaden balls. The said leaden balls discharged from said guns and pistols as aforesaid did then and there penetrate the head, face, and body of him, the said Henry Worley, and him, the said Henry Worley, did then and there kill, because the said Henry Worley, in the exercise of the right and privilege secured to him by the Constitution and laws aforesaid, had reported to W. J. Duncan, a United States deputy marshal, George Terry for having violated the internal-revenue laws of the United States as aforesaid. The said Henry Worley, in reporting said violations of the internal-revenue laws, was then and there in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States; and in furtherance of said conspiracy formed as aforesaid for the purposes aforesaid and as a part thereof, and to effect the object thereof, the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, together with other evil-disposed persons to the grand jurors unknown, being then and there persons of sound memory and discretion, while in the execution of said unlawful and felonious conspiracy among themselves and with each other and with other evil-disposed persons to the grand jurors unknown, on the said 19th day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there, within said district and within the jurisdiction of said court, with force and arms unlawfully, wrongfully, willfully, feloniously, and with malice aforethought, with deadly weapons, to wit, with guns and pistols loaded with gunpowder and leaden balls, shoot him, the said Henry Worley, a citizen of the United States and a human being in the peace of the United States and in the peace of the State of Georgia; said leaden balls discharged from said guns and pistols as aforesaid did then and there penetrate the head, face, and other parts of the body of him, the said Henry Worley, and the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett,

George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, with other evil-disposed persons to the grand jurors unknown, him, the Henry Worley, did then and there kill and murder; all of which said several wrongs and injuries the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmonson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, with the other evil-disposed persons to the grand jurors unknown, to the said Henry Worley *did* then and there did, in pursuance of said conspiracy formed as aforesaid for the purposes aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Third Count.

And the grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the United States of America, do further present that James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, together with divers other evil-disposed persons to the grand jurors unknown, late of said northern district of Georgia, within said district and within the jurisdiction of said court, on the nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there unlawfully, wrongfully, fraudulently, and feloniously combine, confederate, conspire, and agree together between and among themselves and with said other evil-disposed persons unknown to the grand jurors as aforesaid to injure, oppress, threaten, and intimidate one Henry Worley, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States and because of his having so exercised the same, in that he, the said Henry Worley, on the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and ninety-four, had reported to and informed W. J. Duncan, a United States deputy marshal in and for said northern district of Georgia, that James Bell did, on the nineteenth day of March, in the year of our Lord one thousand eight hundred and ninety-four, within said district, violate the internal-revenue laws of the United States by carrying on the business of a distiller without having given bond as required by law, contrary to law. The said conspiracy hereinbefore charged was formed by the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmonson, Bradley

Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, with said other evil-disposed persons to the grand jurors unknown, for the purpose of injuring, oppressing, threatening, and intimidating the said Henry Worley because of his having exercised said right and privilege secured to him as aforesaid by reporting to and informing said W. J. Duncan, who was a deputy marshal as aforesaid, of the violations of the internal-revenue laws as aforesaid by the said James Bell; and in furtherance of said conspiracy so formed as aforesaid for the purposes aforesaid and to effect the object thereof the — James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, together with other evil-disposed persons to the grand jurors unknown, on the said nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-four, within said district and within the *the* jurisdiction of said court, did then and there discharge loaded guns and pistols at him, the said Henry Worley, and did then and there shoot him, the said Henry Worley, said guns and pistols being loaded with powder and leaden balls. The said leaden balls discharged from said guns and pistols as aforesaid did then and there penetrate the head, face, and body of him, the said Henry Worley, and him, the said Henry Worley, did then and there kill because the said Henry Worley, in the exercise of the right and privilege secured to him by the Constitution and laws aforesaid, had reported to W. J. Duncan, a United States deputy marshal, James Bell for having violated the internal-revenue laws of the United States as aforesaid. The said Henry Worley in reporting said violations of the internal-revenue laws was then and there in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States; and in furtherance of said conspiracy formed as aforesaid for the purposes aforesaid and to effect the object thereof the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, together with other evil-disposed persons to the grand jurors unknown, being then and there persons of sound memory and discretion, while in the execution of said unlawful and felonious conspiracy among themselves and with each other and with other evil-disposed persons to the grand jurors unknown, on the said nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-four, within said district and within the jurisdiction of said court, did then and there with force and arms unlawfully, wrongfully, willfully, feloniously, and with malice aforethought, with deadly weapons, to wit, with guns and pistols loaded with gunpowder and leaden balls, shoot him, the said Henry Worley, a citizen of the United States and a human being in the peace of the United States and in the peace of

the State of Georgia. Said leaden balls discharged from said guns and pistols as aforesaid did then and there penetrate the head, face, and other parts of the body of him, the said Henry Worley, and the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, with other evil-disposed persons to the grand jurors unknown, him, the said Henry Worley, did then and there kill and murder; all of which said several wrongs and injuries the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, with the other evil-disposed persons to the grand jurors unknown, to the said Henry Worley then and there did in pursuance of said conspiracy formed as aforesaid for the purposes aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Fourth Count.

And the grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the United States of America, do further present that James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, together with divers other evil-disposed persons to the grand jurors unknown, late of said northern district of Georgia, within said district and within the jurisdiction of said court, on the nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there unlawfully, wrongfully, fraudulently, and feloniously combine, confederate, conspire, and agree together between and among themselves and with said other evil-disposed persons to the grand jurors unknown to injure, oppress, threaten, and intimidate one Henry Worley, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States and because of his having so exercised the same, in that he, the said Henry Worley, on the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and ninety-four, did report to and inform W. J. Duncan, a United States deputy marshal in and for said northern district of Georgia, that Charley Hyde did on the nineteenth day of March, in the year of our Lord one thousand eight hundred and ninety-four, within said district, violate the internal-revenue laws of the United States by carrying on the business of a distiller without having given bond as required by law, contrary to law. The said conspiracy hereinbefore charged

was formed by the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, with said other evil-disposed persons to the grand jurors unknown, for the purpose of injuring, oppressing, threatening, and intimidating the said Henry Worley because of his having exercised said right and privilege secured to him as aforesaid in reporting to and informing said J. W. Duncan, who was a deputy marshal as aforesaid, of the violations of the internal-revenue laws of the United States as aforesaid by the said Charley Hyde; and in furtherance of said conspiracy so formed as aforesaid and for the purposes aforesaid and to effect the object thereof the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, together with other evil-disposed persons to the grand jurors unknown, on the said nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-four, within said district and within the jurisdiction of said court, did then and there discharge loaded guns and pistols at him, the said Henry Worley, and did then and there shoot him, the said Henry Worley, said guns and pistols being loaded with powder and leaden balls. The said leaden balls discharged from said guns and pistols as aforesaid did then and there penetrate the head, face, and body of him, the said Henry Worley, and him, the said Henry Worley, did then and there kill because he, the said Henry Worley, in the exercise of the right and privilege secured to him by the Constitution and laws as aforesaid, had reported to W. J. Duncan, a United States deputy marshal as aforesaid, Charley Hyde for having violated the internal-revenue laws as aforesaid. The said Henry Worley in reporting said violations of the internal-revenue laws of the United States was then and there in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States; and in furtherance of said conspiracy formed as aforesaid for the purposes aforesaid and to effect the object thereof the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, together with other evil-disposed persons to the grand jurors unknown, being then and there persons of sound memory and discretion, while in the execution of said unlawful and felonious conspiracy among themselves and with each other and with other evil-disposed persons to the grand jurors unknown, on the said nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-four, within said district and within the jurisdiction of said court, did

then and there with force and arms unlawfully, wrongfully, willfully, feloniously and with malice aforethought, and with deadly weapons, to wit, with guns and pistols loaded with gunpowder and leaden balls, shoot him, the said Henry Worley, a citizen of the United States and a human being in the peace of the United States and in the peace of the State of Georgia. Said leaden balls discharged from said guns and pistols as aforesaid did then and there penetrate the head, face, and other parts of the body of him, the said Henry Worley, and the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, with other evil-disposed persons to the grand jurors unknown, him, the said Henry Worley, did then and there kill and murder; all of which said several wrongs and injuries the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, with the other evil-disposed persons to the grand jurors unknown, to the said Henry Worley then and there did in pursuance of said conspiracy formed as aforesaid for the purposes aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Fifth Count.

And the grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the United States of America, do further present that James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, together with divers other evil-disposed persons to the grand jurors unknown, late of said northern district of Georgia, within said district and within the jurisdiction of said court, on the nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there unlawfully, wrongfully, fraudulently, and feloniously combine, confederate, conspire, and agree together between and among themselves and with said other evil-disposed persons to the grand jurors unknown to injure, oppress, threaten, and intimidate one Henry Worley, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States and because of his having so exercised the same, in that he, the said Henry Worley, on the nineteenth day of March, in the year of our Lord one thousand eight hundred and ninety-four, had reported to and informed W. J.

Duncan, a United States deputy marshal in and for said northern district of Georgia, that Bradley Thornton and Thomas McEntire did, on the fifteenth day of February, in the year of our Lord one thousand eight hundred and ninety-four, violate the internal-revenue laws of the United States by carrying on the business of a distiller without having given bond as required by law, contrary to law, and in that he, the said Henry Worley, on the nineteenth day of March, in the year of our Lord one thousand eight hundred and ninety-four, did report to and inform W. J. Duncan, a United States deputy marshal as aforesaid, that George Terry, on said nineteenth day of March, in the year of our Lord one thousand eight hundred and ninety-four, within said district, did violate the internal-revenue laws of the United States by carrying on the business of a distiller without having given bond as required by law, contrary to law; in that he, the said Henry Worley, on the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and ninety-four, did report to and inform W. J. Duncan, deputy marshal as aforesaid, that James Bell and Charley Hyde and each of them did, on the nineteenth day of March, in the year of our Lord one thousand eight hundred and ninety-four, within said district, violate the internal-revenue laws of the United States by carrying on the business of a distiller without having given bond as required by law, contrary to law. The said conspiracy hereinbefore charged was formed by the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, with said other evil-disposed persons to the grand jurors unknown, for the purpose of injuring, oppressing, threatening, and intimidating the said Henry Worley because of his having exercised said right and privilege secured to him as aforesaid in reporting to and informing said W. J. Duncan, who was a deputy marshal as aforesaid, of the violations of the internal-revenue laws as aforesaid by the said Bradley Thornton, Thomas McEntire, George Terry, James Bell, and Charley Hyde; and in furtherance of said conspiracy so formed as aforesaid for the purposes aforesaid and to effect the object thereof the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, together with other evil-disposed persons to the grand jurors unknown, on said nineteeth day of April, in the year of our Lord one thousand eight hundred and ninety-four, within said district and within the jurisdiction of said court, did then and there discharge loaded guns and pistols at him, the said Henry Worley, and did then and there shoot him, the said Henry Worley, said guns and pistols being loaded with powder and leaden balls. Said leaden balls discharged from said guns and pistols as aforesaid did then and there penetrate the head, face, and body of him, the said

Henry Worley, and him, the said Henry Worley, did then and there kill because he, the said Henry Worley, in the exercise of the right and privilege secured to him by the Constitution and laws of the United States, had reported to W. J. Duncan, a United States deputy marshal, Bradley Thornton, Thomas McEntire, George Terry, James Bell, and Charley Hyde for having violated the internal-revenue laws as aforesaid. The said Henry Worley in reporting said violations of the internal-revenue laws of the United States was then and there in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States; and in furtherance of said conspiracy, formed as aforesaid for the purposes aforesaid, and to effect the object thereof, the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, together with other evil-disposed persons to the grand jurors unknown, being then and there persons of sound memory and discretion, while in the execution of said unlawful and felonious conspiracy among themselves and with each other and with other evil-disposed persons to the grand jurors unknown, on the said nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-four, within said district and within the jurisdiction of said court, did then and there, with force and arms, unlawfully, wrongfully, willfully, feloniously, and with malice aforethought, and with deadly weapons, to wit, guns and pistols loaded with gunpowder and leaden balls, shoot him, the said Henry Worley, a citizen of the United States and a human being in the peace of the United States and in the peace of the State of Georgia; said leaden balls discharged from said guns and pistols as aforesaid did then and there penetrate the head, face, and other parts of the body of him, the said Henry Worley; and the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Sorley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, with other evil-disposed persons to the grand jurors unknown, him, the said Henry Worley, did then and there kill and murder. All of said several wrongs and injuries the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, with other evil-disposed persons to the grand jurors unknown, to the said Henry Worley then and there did in pursuance of said conspiracy formed as aforesaid for the purposes aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Sixth Count.

And the grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the United States of America, do further present that the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, together with divers other evil-disposed persons to the grand jurors unknown, late of said northern district of Georgia, within said district and within the jurisdiction of said court, on the nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-four, did then and there unlawfully, wrongfully, fraudulently, and feloniously combine, confederate, conspire, and agree together between and among themselves and with other evil-disposed persons to the grand jurors unknown to injure a witness in his person, to wit, Henry Worley, on account of his having, on the twentieth day of March, in the year of our Lord one thousand eight hundred and ninety-four, appeared before H. C. Hamilton, a United States circuit court commissioner in and for said northern district of Georgia, as a witness in the case, then and there pending, of the United States against James Higgins, who was then and there charged with carrying on the business of a distiller without having given bond as required by law, and with working in a distillery on which no sign was placed and kept exhibiting in plain and legible letters, not less than three inches in length, painted in oil colors or gilded, and of a proper and proportionate width, the name or firm of the distiller, with the words "registered distillery," as required by law, and on account of his having testified to said matter pending before said H. C. Hamilton, commissioner as aforesaid, in behalf of the United States, freely, fully, and truthfully, the said H. C. Hamilton then and there holding a commissioner's court to investigate said charge against said James Higgins, the same being a court of the United States; the said Henry Worley was then and there sworn as a witness for the United States in said case, and, after taking said oath and after appearing as said witness as aforesaid, did then and there testify freely, fully, and truthfully about and concerning the matter therein pending; and in furtherance of said conspiracy so formed as aforesaid for the purposes aforesaid, and to effect the object thereof, the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, with said other evil-disposed persons to the grand jurors unknown, on the said nineteenth day of April, in the year of our Lord one thousand eight hundred and ninety-four, within said district, did then and there discharge loaded guns and pistols at him, the said Henry Worley, and did then and there shoot him, the said Henry Worley, said guns and

pistols being loaded with powder and leaden balls, said leaden balls discharged from said guns and pistols as aforesaid then and there penetrating the head, face, and body of him, the said Henry Worley, and did then and there kill and murder the said Henry Worley. All of said several wrongs and injuries the said James McEntire, James McCutchen, John Henry Goble, Frank Gilbert, Harris Bramlett, George Hartsell, Tobe Smith, James Parsons, J. M. Morrison, Hawkins Worley, John Edmondson, Bradley Thornton, Ves Worley, T. M. Wright, Thomas Burgess, George W. Terry, Bill Hannah, and Merrill Woods, together with other evil-disposed persons to the grand jurors unknown, then and there did to the said Henry Worley because he, the said Henry Worley, had attended the United States court as aforesaid and testified therein freely, fully, and truthfully in said case pending in said court, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

A true bill. April 2, 1895.

CLARENCE KNOWLES, *Foreman.*

J. S. JAMES,
U. S. Attorney.

Filed in clerk's office April 2d, 1895.

O. C. FULLER,
Clerk U. S. C.

[Endorsed:] No. 4463. United States circuit court, northern district of Georgia. March term, 1895. United States *vs.* James McEntire *et al.* Conspiracy, vio. secs. 5508, '9, 5406 R. S. of Murray County. (Conspiracy and murder.) A true bill. 2 day of April, 1895. Clarence Knowles, foreman. Filed in office April 2, 1895. O. C. Fuller, clerk U. S. C., per —— ——, deputy clerk.

In the Circuit Court of the United States for the Northern District of Georgia.

UNITED STATES
vs.
JAMES A. MCENTIRE *et al.*

No. 4463. March Term, 1895. Conspiracy, Violating Sections 5508, 5509, and 5406, Revised Statutes of the United States.

I.

And now comes James A. McEntire and John H. Goble in their own proper persons into court, and, having heard the said indictment read, say that the said indictment and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law, and that they, the said James A. McEntire and John H. Goble, are not bound by the law of the land to answer the same; and this they are ready to verify. Wherefore, for want of sufficient indictment in this behalf, the said James A. McEntire and John H. Goble pray judgment, and that by the court

they may be dismissed and discharged from said premises in said indictment specified.

II.

And each and all of the above-named demurrants specially demur to the first count in the said indictment and pray to be discharged from any answer thereon for the following causes, which are assigned as distinct and separate causes of demurrer to the said first count: First, because the right and privilege alleged as the right and privilege of a citizen of the United States is not one secured by the Constitution and laws of the United States; second, because there is no such right and privilege secured to the citizens of the United States as such citizens as that set out in the said first count; third, because there is no allegation of the time when or the place where one Thomas McEntire and Bradley Thornton had engaged in the business of a distiller, nor is there any sufficient allegation of the guilt of the said Thomas McEntire and Bradley Thornton of any violation of the internal-revenue laws, nor is any specification given so as to make the same a traversible fact in the trial of this case; fourth, because the charge as to the formation of the conspiracy is not specific, precise, and definite, and because there is no sufficient allegation as to the manner and circumstances of the same; fifth, because there is no sufficient charge of the offense of murder in the perpetration of the conspiracy, as required by law; sixth, because there is no offense charged in the said first count of which the courts of the United States can have or take cognizance.

III.

And each and all of the above-named demurrants specially demur to the second count in said indictment and pray to be discharged from any answer thereon for the following causes, which are assigned as distinct and separate causes of demurrer to the said second count: First, because the right and privilege alleged as the right and privilege of a citizen of the United States is not one secured by the Constitution and laws of the United States; second, because there is no such right and privilege secured to the citizens of the United States as such citizens as that set out in the said second count; third, because there is no allegation of the time when or the place where one Charlie Hyde had engaged in the business of a distiller, nor is there any sufficient allegation of the guilt of the said Charlie Hyde of any violation of the internal-revenue laws, nor is any specification given so as to make the same a traversible fact in the trial of this case; fourth, because the charge as to the formation of the conspiracy is not specific, precise, and definite, and because there is no sufficient allegation as to the manner and circumstances of the formation of the same; fifth, because there is no sufficient charge of the offense of murder in the perpetration of the conspiracy, as required by law; sixth, because there is no offense charged in the said second count of which the courts of the United States can have or take cognizance.

IV.

And each and all of the above-named demurrants specially demur to the third count in the said indictment and pray to be discharged from any answer thereon for the following causes, which are assigned as distinct and separate causes of demurrer to the said third count: First, because the right and privilege alleged as the right and privilege of a citizen of the United States is not one secured by the Constitution and laws of the United States; second, because there is no such right and privilege secured to the citizens of the United States as such citizens as that set out in the said third count; third, because there is no allegation of the time when or the place where one James Bell had engaged in the business of a distiller, nor is there any sufficient allegation of the guilt of the said James Bell of any violation of the internal-revenue laws, nor is any specification given so as to make the same a traversible fact in the trial of this case; fourth, because the charge as to the formation of the conspiracy is not specific, precise, and definite, and because there is no sufficient allegation as to the manner and circumstances of the formation of the same; fifth, because there is no sufficient charge of the offense of murder in the perpetration of the conspiracy, as required by law; sixth, because there is no offense charged in the said third count of which the courts of the United States can have or take cognizance.

V.

And each and all of the above-named demurrants specially demur to the fourth count in the said indictment and pray to be discharged from any answer thereon for the following causes, which are assigned as separate and distinct causes of demurrer to the said fourth count: First, because the right and privilege alleged as the right and privilege of a citizen of the United States is not one secured by the Constitution and laws of the United States; second, because there is no such right and privilege secured to the citizens of the United States as such citizens as that set out in the said fourth count; third, because there is no allegation of the time when or the place where one George Terry had engaged in the business of a distiller, nor is there any sufficient allegation of the guilt of the said George Terry of any violation of the internal-revenue laws, nor is there any specification given so as to make the same a traversible fact in the trial of this case; fourth, because the charge as to the formation of the conspiracy is not specific, precise, and definite and because there is no sufficient allegation as to the manner and circumstances of the formation of the same; fifth, because there is no sufficient charge of the offense of murder in the perpetration of the conspiracy, as required by law; sixth, because there is no offense charged in the said fourth count of which the courts of the United States can have or take cognizance.

VI.

To the fifth count of the said indictment each and all of the above-named demurrants specially demur and assign for special

cause of demurrer as follows, to wit: First, that a United States circuit court commissioner does not hold a court of the United States, nor is the same a court within the meaning of section 5406 of the Revised Statutes of the United States; second, that there is no such thing as a commissioner's court under the laws of the United States; third, because section 5406 has no application to the facts stated in the said indictment; fourth, because there is no such right and privilege secured by the Constitution and laws of the United States as that specified in the said fifth count; fifth, because the conspiracy alleged and charged is so vaguely and indistinctly charged as to be insufficient in law, sixth, because there is no sufficient allegation of the crime of murder set forth in the said count; seventh, because there is no crime or offense of which the courts of the United States can take cognizance charged in the said count.

VII.

To the sixth count of the said indictment each and all of the above-named demurrants specially demur, and assign for special cause of demurrer as follows, to wit: First, that section 5406 of the Revised Statutes of the United States has no application to witnesses before a United States commissioner; second, that a circuit court commissioner does not hold a court of the United States; third, because the conspiracy charged is so indefinite in its description as to be insufficient in law; fourth, that no offense is charged of which the courts of the United States can have or take cognizance.

Each and all of the above-named demurrants specially demur to the above-named indictment, and for cause of demurrer say that neither in the first, second, third, fourth, fifth, nor sixth counts of the said indictment is there any offense charged whereof the courts of the United States can have or take cognizance.

Wherefore, for each and all of the above causes, defendants pray that they may be discharged and go hence without a day.

GLENN & RONTREE,
J. E. ROBINSON,
Counsel for Defendants.

Filing.

Filed in clerk's office April 15th, 1895.

O. C. FULLER, *Clerk.*

UNITED STATES *vs.* JAMES A. McENTIRE *et al.*	No. 4463. March Term, 1895. Conspiracy, Violating Sections 5508, 5509, and 5406 Revised Statutes of the United States.

This demurrer coming on to be heard and after hearing and considering the same it is ordered and adjudged by the court that the demurrer to the first, second, third, and fourth counts is not well

founded in point of law, and the demurrer as to those counts is hereby overruled.

It is further considered and adjudged that the demurrer to the fifth and sixth counts is well founded in point of law, and the demurrer as to those counts is hereby ordered and adjudged to be sustained.

Open court, this April 16th, 1895.

WM. T. NEWMAN,
U. S. Judge.

Filed in clerk's office 16th day of April, 1895.

O. C. FULLER, *Clerk.*

The defendants James A. McEntire and John H. Gober except to the judgment above so far as the same overrules their demurrer. This exception is allowed, filed, and noted by the court.

Open court, April 16th, 1895.

WM. T. NEWMAN,
U. S. Judge.

Filed in clerk's office 16th day of April, 1895.

O. C. FULLER, *Clerk.*

UNITED STATES OF AMERICA, *Northern District of Georgia,* } *ss:*

I, O. C. Fuller, clerk of the United States circuit court in and for the northern district of Georgia, do hereby certify that the foregoing and attached 27 pages of printing and writing *is* a true, full, correct, and complete copy of the original bill of indictment, demurrer, judgment on the demurrer, and exceptions of James A. McEntire and John H. Goble on file and remaining of record in my office in the matter of The United States of America against James McEntire, John Henry Goble, and others.

Seal U. S. Circuit Court, N. D. Georgia.

In testimony whereof I hereunto set my hand and seal of the said circuit court, at Atlanta, Ga., this the 16th day of April, A. D. 1895.

O. C. FULLER, *Clerk.*

SUPREME COURT U. S.

OCTOBER TERM, 1894.

IN RE MOTION OF

JOHN M. QUARLES, SR.,

AND

DAVID BUTLER

FOR LEAVE TO FILE A PETITION FOR WRIT OF HABEAS CORPUS.

GLENN & ROUNTREE,

ATTORNEYS.

SUPREME COURT OF THE UNITED STATES.

October Term, 1894.

In Re. Motion of John Quarles, Sr., and David Butler for leave to file a Petition for Writ of *Habeas Corpus.*

To the Honorable Supreme Court of the United States:

And now, on this, the 22nd day of April, 1895, come John Quarles, Sr., and David Butler, by their attorney, W. C. Glenn, and move the Court for leave to file a petition for the Writ of *Habeas Corpus* in the case of the United States *versus* James A. McEntire, *et al.*, No. 4464, in the Circuit Court of the United States for the Northern District of Georgia, the said Writ of *Habeas Corpus* to be issued and directed to Samuel C. Dunlap, United States Marshal for the Northen District of Georgia.

The facts upon which this motion is based are as follows, to-wit:

First. At the March Term, 1895, of the Circuit Court of the United States, for the Northern District of Georgia, movants, together with others in the indictment named, were jointly indicted for the offense of conspiracy under sections 5508 and 5509 of the revised Statutes of the United States, and for violation of Section 5406 of the Revised Statutes of the United States.

Second. The conspiracy charged in said indictment "was to injure, oppress, threaten and intimidate one Henry Worley, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and Laws of the United States, and because of his having so exercised the same, in that he, the said Henry Worley, on the 19th day of March, in the year of our Lord,

one thousand eight hundred and ninety-four, had reported to and informed W. J. Duncan, a United States Deputy Marshal in and for the Northern District of Georgia, that Bradley Thornton and Thomas McEntyre did, on the 15th day of February, in the year of our Lord one thousand eight hundred and ninety-four, within said district, violate the internal revenue laws of the United States by carrying on the business of a distiller without having given bond as required by law." There are four counts in the said indictment on this subject, the charges being identical, except in the name of the person about whom Henry Worley had given information. In the second count the person informed upon is said to be Geo. Terry; in the third, James Bell; in the fourth, Charlie Hyde. The last two counts in the said indictment, based upon Section 5406 of the Revised Statutes of the United States, are not involved, because the Court sustained a demurrer to the said two counts, leaving said indictment to stand upon the four above mentioned counts.

Third. On the 8th day of April, 1895, movants demurred to the indictment above mentioned. There is a general demurrer and also special demurrers to each and every count in the said indictment. The material portions of the special demurrers are, first, because the right and privilege alleged as the right and privilege of a citizen of the United States is not one secured by the Constitution and Laws of the United States. Second, because there is no such right and privilege secured to the citizens of the United States, as such citizens, as that set out in the said first count. Third, because there is no offense charged, either in the indictment as a whole, or in the the first, second, third or fourth counts of which the Courts of the United States can have, or take cognizance.

Fourth. On the 8th day of April, 1895, the demurrer coming on to be heard, it was over-ruled as to the first, second,

third and fourth counts, the Court holding that it charges a right and privilege of a citizen of the United States, and a case within the cognizance of the Circuit Court of the United States and within the jurisdiction of said Court and within the true intent and meaning of Sections 5508 and 5509 of the Revised Statutes of the United States. Movants having thus tested the sufficiency of this indictment on the question of the jurisdiction of the Court prior to the filing of this motion.

Fifth. Movants then and there, after the over-ruling of their demurrer, were formally arraigned and pleaded not guilty, and upon the trial were found guilty, as charged in the first four counts of the said indictment. The date of the verdict is the 13th day of April, 1895.

Sixth. On the 15th day of April, 1895, movants submitted a motion in arrest of judgment upon substantially the same grounds as those presented and set forth in the demurrer aforesaid. This motion was duly filed and served and coming on to be heard was, on the 16th day of April, 1895, over-ruled and the defendants, movants here, sentenced to five years at hard labor in the penitentiary.

Seventh. Movants present with this motion a complete and duly certified copy of the record in said case, consisting of the indictment against petitioners, demurrer, and judgment thereon, issue, verdict, motion in arrest of judgment and sentence. Exceptions were duly taken and noted to the over-ruling of the demurrer and the over-ruling of the motion in arrest of judgment, which exceptions also appear in the record.

Eighth. Movants present with this motion a duly signed and verified petition for a Writ of *Habeas Corpus*, alleging that they are in the custody of Samuel C. Dunlap, Marshal of the Northern District of Georgia, and are detained by him

under the proceedings and order of a Court without jurisdiction and that their restraint is illegal because in violation of the Constitution and Laws of the United States and without any warrant whatever or authority derived from the Constitution and Laws of the United States.

Wherefore, They pray leave to file a petition for the Writ of *Habeas Corpus* to be issued out of this Court, directed to Samuel C. Dunlap, Marshal of the Northern District of Georgia, for the purpose of having the legality of their custody inquired into and for the purpose of having such other and further relief as may be proper in the premises.

GLENN & ROUNTREE,
of Counsel.

JOHN QUARLES,
DAVID BUTLER.
By their attorney,
W. C. GLENN.

ATLANTA, GA., April 17th, 1895.

Hon. J. S. James, U. S. Dist. Att'y, Atlanta, Georgia:

DEAR SIR:—Kindly take notice that at a meeting of the Supreme Court of the United States to be held in the City of Washington, on Monday April 22nd, 1895, I shall present the above and foregoing motion for leave to file a petition for Writ of *Habeas Corpus* in behalf of John Quarles, Sr., and David Butler, or such other motion to that effect as may be deemed proper for leave to file said petition.

Yours truly,
W. C. GLENN.

Due and legal service of notice of this motion and copy of the motion is acknowledged. I have also received copy of the petition for *Habeas Corpus* which it is proposed to file in this case. This April 16, 1895.

J. S. JAMES,
U. S. Att'y.

SUPREME COURT U. S.

OCTOBER TERM, 1894.

IN RE MOTION OF

JAMES A. McENTIRE

AND

JOHN H. GOBLE,

FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS.

GLENN & ROUNTREE,

ATTORNEYS.

SUPREME COURT OF THE UNITED STATES.

October Term, 1894.

In Re. Motion of James A. McEntire and John H. Goble for leave to file a Petition for Writ of *Habeas Corpus.*

To the Honorable Supreme Court of the United States:

And now, on this the 22nd day of April, 1895, come James A. McEntire and John H. Goble, by their attorney, W. C. Glenn, and move the Court for leave to file a petition for the Writ of *Habeas Corpus* in the case of the United States *versus* James A. McEntire, *et. al.*, in the Circuit Court of the United States for the Northern District of Georgia, the said Writ of *Habeas Corpus* to be issued and directed to Samuel C. Dunlap, United States Marshal for the Northern District of Georgia.

The facts upon which this motion is based are as follows, to-wit:

First. At the March Term, 1895, of the Circuit Court of the United States for the Northern District of Georgia, movants, together with others in the indictment named, were jointly indicted for the offense of conspiracy under sections 5508 and 5509 of the Revised Statutes of the United States and for violation of Section 5406 of the Revised Statutes of the United States.

Second. The conspiracy charged in said indictment "was to injure, oppress, threaten and intimidate one Henry Worley, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and Laws of the United States, and because of his having so exercised the same, in that he, the said Henry Worley, on the 19th day of March, in the year of our Lord One Thousand Eight Hundred and Ninety-four,

had reported to and informed W. J. Duncan, a United States Deputy Marshal in and for the Northern District of Georgia, that Bradley Thornton and Thomas McEntire did, on the 15th day of February, in the year of our Lord One Thousand Eight Hundred and Ninety-four, within said district, violate the internal revenue laws of the United States by carrying on the business of a distiller, without having given bond as required by law." There are four counts in the said indictment on this subject, the charges being identical, except in the name of the person about whom Henry Worley had given information. In the second count the person informed upon is said to be Geo. Terry; in the third, James Bell; in the fourth, Charlie Hyde. The last two counts in the said indictment, based upon Section 5406 of the Revised Statutes of the United States, are not involved because the Court sustained a demurrer to the said two counts, leaving said indictment to stand upon the four above mentioned counts.

Third. On the 15th day of April, 1895, movants demurred to the indictment above mentioned. There is a general demurrer and also special demurrers to each and every count in the said indictment. The material portions of the special demurrers, are, first, because the right and privilege alleged as the right and privilege of a citizen of the United States is not one secured by the Constitution and Laws of the United States. Second, because there is no such right and privilege secured to the citizens of the United States, as such citizens, as that set out in the said first count. Third, because there is no offense charged, either in the indictment as a whole, or in the first, second, third or fourth counts of which the Courts of the United States can have, or take, cognizance.

Fourth. On the 16th day of April, 1895, the demurrer coming on to be heard, it was over-ruled as to the first, second, third and fourth counts, the Court holding that it

charges a right and privilege of a citizen of the United States, and a case within the cognizance of the Circuit Court of the United States and within the jurisdiction of said Court, and within the true intent and meaning of Sections 5508 and 5509 of the Revised Statutes of the United States. Movants having thus tested the sufficiency of this indictment on the question of the jurisdiction of the Court prior to the filing of this motion.

Fifth. Movants present with this motion a complete and duly certified copy of the record in said case, consisting of the indictment, demurrer and judgment thereon, which are here ready to the Court to be shown.

Sixth. Movants present with this motion a duly signed and verified petition for a Writ of *Habeas Corpus*, alleging that they are in the custody of Samuel C. Dunlap, Marshal of the Northern District of Georgia, and are detained by him under the proceedings and order of a Court without jurisdiction and that their restraint is illegal because in violation of the Constitution and Laws of the United States and without any warrant whatever or authority derived from the Constitution and Laws of the United States.

Wherefore, they pray leave to file a petition for the Writ of *Habeas Corpus*, to be issued out of this Court directed to Samuel C. Dunlap, Marshal of the Northern District of Georgia, for the purpose of having the legality of their custody inquired into and for the purpose of having such other and further relief as may be proper in the premises.

Glenn & Rountree,
of Counsel.

James A. McEntire,
John H. Goble,
by their Attorney,
W. C. Glenn.

ATLANTA, GA., April 17th, 1895.

Hon. J. S. James, U. S. Dist. Att'y. Atlanta, Ga.:

DEAR SIR:—Kindly take notice that at a meeting of the Supreme Court of the United States to be held in the City of Washington on Monday, April 22nd, 1895, I shall present the above and foregoing motion for leave to file a petition for Writ of *Habeas Corpus* in behalf of James A. McEntire and John H. Goble, or such other motion to that effect as may be deemed proper for leave to file said petition.

Yours truly,

W. C. GLENN.

Due and legal service of notice of this motion and copy of the motion is acknowledged. I have also received copy of the petition for *Habeas Corpus* which it is proposed to file in this case. This, April 16, 1895.

J. S. JAMES,
U. S. Att'y.

SUPREME COURT U. S.

OCTOBER TERM, 1894.

PETITION OF

JOHN M. QUARLES, SR.,

AND

DAVID BUTLER

FOR WRIT OF HABEAS CORPUS.

GLENN & ROUNTREE,

ATTORNEYS.

To the Honorable Supreme Court of the United States:

The petition of John Quarles, Sr., and David Butler respectfully showeth, That they are citizens of the United States of America and that their liberty is now being restrained and that they are now in the custody of Samuel C. Dunlap, United States Marshal for the Northern District of Georgia, and are by him kept in custody in the county jail of Fulton county, Georgia, under a sentence of the Circuit Court of the United States for the Northern District of Georgia; that the said sentence is based upon a verdict finding these petitioners guilty on an issue joined upon an indictment based upon Sections 5508 and 5509 of the Revised Statutes of the United States. Petitioners show that the said indictment is a joint indictment against them and others in said indictment named. Your petitioners allege that their liberty is unlawfully and illegally restrained under said verdict and sentence because the matters and things set forth and charged in the said indictment and in the several counts thereof do not constitute any offense or offenses against the laws of the United States and do not come within the purview, true intent and meaning of the Act approved May 31st, 1870, entitled An Act to Enforce the Rights of the Citizens of the United States, etc., nor any part thereof, and because the matters and things in the said indictment and the various counts thereof set forth and charged do not constitute any offense or offenses cognizable in the said Circuit Court and do not come within its power and jurisdiction.

Petitioners further allege that prior to arraignment and prior to any plea to the merits of the said indictment they

filed a demurrer to the said indictment upon the grounds that it charged no offense under the Laws of the United States and upon other grounds which will appear by reference to a certified copy of the demurrer and judgment thereon, hereto attached.

Petitioners allege that they have tested the sufficiency of the said indictment in the Circuit Court of the United States prior to this petition for a writ of *Habeas Corpus*.

Petitioners attach to this petition a duly and properly certified transcript of the entire record in the said case, and allege that their custody by the Marshal of the Northern District of Georgia for any of the reasons set forth in said proceedings is wholly illegal and in violation of the Constitution and Laws of the United States and without any warrant whatever derived from the Constitution and Laws of the United States. These exhibits they ask to be taken as a part of this petition and are hereby made a part of its allegations. They consist, first, of the indictment against petitioners and others, second, the demurrer to the said indictment, third, the judgment of the Court over-ruling the demurrer as to the first four counts and sustaining it as to the last two counts in said indictment, fourth, the arraignment and formal entry of plea of not guilty, fifth, the verdict of the jury on said issue, and sixth, the sentence of the Court.

Wherefore, your petitioners pray that the Writ of *Habeas Corpus* may issue out of this Court directed to the said Samuel C. Dunlap, United States Marshal for the Northern District of Georgia, commanding him to produce the bodies of your petitioners together with the cause of their detention to the end that your petitioners may be discharged from custody. And your petitioners further pray that the Writ of *Certiorari* may issue directed to the Clerk of the Circuit

Court for the Northern District of Georgia commanding him to certify and send up to this Court the said indictment and all proceedings thereunder.

JOHN M. QUARLES, SR.
DAVID S. BUTLER.

STATE OF GEORGIA,
COUNTY OF FULTON.

John Quarles, Sr., and David Butler being duly sworn depose and say that they are the petitioners named in the foregoing petition subscribed by them; that each has read the same and knows the contents thereof and the said statements made are true, as the said John Quarles, Sr., and the said David Butler verily believe.

JOHN M. QUARLES, SR.
DAVID S. BUTLER.

Sworn to by the said John Quarles, Sr., and by the said David Butler before me, and by me subscribed on this 16th day of April, 1895. O. C. FULLER,
United States Circuit Court Commissioner for the Northern District of Georgia.

158 Orig.

SUPREME COURT U. S.

OCTOBER TERM, 1894.

PETITION OF

JAMES A. McENTIRE

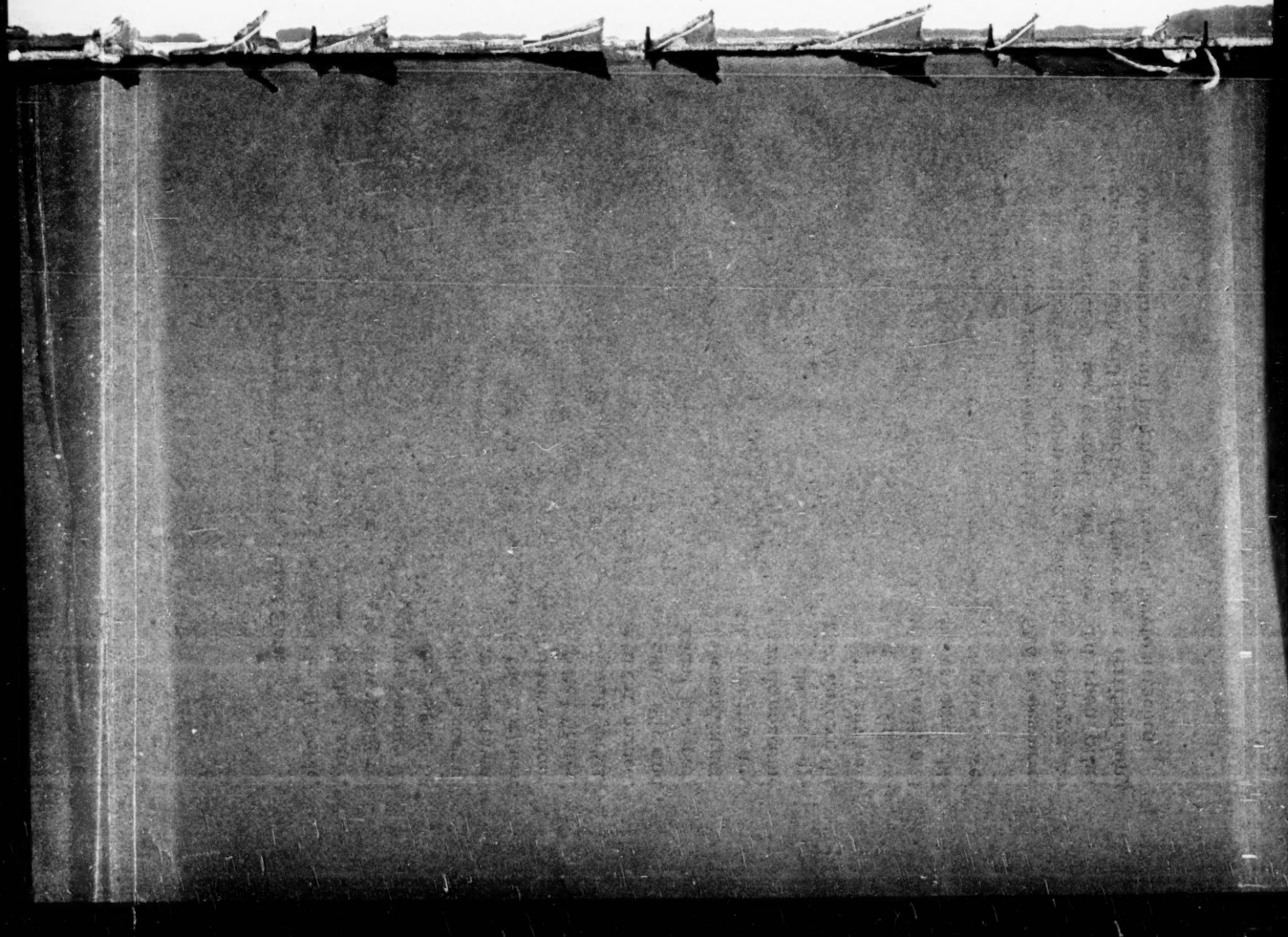
AND

JOHN H. GOBLE

FOR WRIT OF HABEAS CORPUS.

GLENN & ROUNTREE,

ATTORNEYS.



To the Honorable Supreme Court of the United States:

The petition of James A. McEntire and John H. Goble, respectfully showeth that they are citizens of the United States of America, and that their liberty is now being restrained, and that they are now in the custody of Samuel C. Dunlap, United States Marshal for the Northern District of Georgia, and they are, by him, kept in custody in the county jail of Fulton county, Georgia, under color of an indictment in the Circuit Court of the United States for the Northern District of Georgia. Said indictment is based upon sections 5508 and 5509 of the Revised Statutes of the United States. Petitioners show that the said indictment is a joint indictment against them and others in said indictment named. Your petitioners allege that their liberty is unlawfully and illegally restrained under said indictment because the matters and things set forth and charged in the said indictment and in the several counts therof do not constitute any offense against the laws of the United States and do not come within the purview, true intent and meaning of the Act approved May 31st, 1870, entitled, an Act to Enforce the Rights of the Citizens of the United States, etc., nor any part thereof, and because the matters and things in the said indictment and the various counts thereof set forth and charged do not constitute any offense or offenses cognizable in the said Circuit Court and do not come within its power and jurisdiction.

Petitioners further allege that they have filed a demurrer to the said indictment upon the ground that it charges no offense under the law of the United States and upon other grounds which will appear by reference to a certified copy of the demurrer and judgment thereon, hereto attached.

Petitioners allege that they have tested the sufficiency of the said indictment in the Circuit Court of the United States for the Northern District of Georgia prior to this petition for a writ of *Habeas Corpus*. Petitioners attach to this petition a duly and properly certified transcript of the entire record in the said case and allege that their custody by the Marshal of the Northern District of Georgia for any of the reasons set forth in said proceedings is wholly illegal and in violation of the Constitution and Laws of the United States and without any warrant whatever derived from the Constitution and Laws of the United States. These exhibits they ask to be taken as a part of this petition and they are hereby made a part of its allegations. They consist, first, of the indictment against the petitioners and others, second, the demurrer to the said indictment, third, the judgment of the Court over-ruling the demurrer as to the first four counts and sustaining it as to the two last counts in the said indictment, and, fourth, the exception to said judgment noted and allowed filed by the Court.

Wherefore, your petitioners pray that the writ of *Habeas Corpus* may issue out of this Court directed to the said Samuel C. Dunlap, United States Marshal for the Northern District of Georgia, commanding him to produce the bodies of your petitioners, together with the cause of their detention, to the end that your petitioners may be discharged from custody. And your petitioners further pray that the writ of *Certiorari* may issue directed to the Clerk of the Circuit Court of the United States for the Northern District of Georgia commanding him to certify and send up to this Court the said indictment and all proceedings thereunder

JAMES A. MCENTIRE.
JOHN H. GOBLE.

STATE OF GEORGIA, }
COUNTY OF FULTON. }

James A. McEntire and John H. Goble being duly sworn depose and say that they are the petitioners named in the foregoing petition subscribed by them; that each has read the same and knows the contents thereof and the said statements made are true, as the said James A. McEntire and the said John H. Goble verily believe.

JAMES A. MCENTIRE.
JOHN H. GOBLE.

Sworn to by the said James A. McEntire and by the said John H. Goble before me, and by me subscribed on this 18th day of April, 1895.

A. A. MEYER,
Notary Public, Fulton County, Georgia.

ORIGINAL.

Supreme Court of the United States.

OCTOBER TERM, 1894.

MOTION OF JOHN M. QUARLES, SR., AND DAVID BUTLER FOR LEAVE TO FILE PETITION FOR WRIT OF *HABEAS CORPUS*.

Statement, Brief, and Argument for Movants.

W. C. GLENN, AND
D. W. ROUNTREE,
Counsel for Movants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

ORIGINAL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1894.

MOTION OF JOHN M. QUARLES, SR., AND DAVID BUTLER FOR LEAVE TO FILE PETITION FOR WRIT OF *HABEAS CORPUS*.

Statement, Brief, and Argument for Movants.

W. C. Glenn and D. W. Rountree, counsel for movants.

STATEMENT OF FACTS.

Henry Worley lived in Murray county, which is in the northern district of Georgia. On the — day of March, 1894, a party of masked men came to his house, took him out, carried him a number of miles, and endeavored to kill him by hanging. The attempt was unsuccessful. About two weeks thereafter, in April, 1894, while Worley was at work in his field, a party of men came to him and engaged him in conversation and assassinated him in his field. Prior to his assassination and the attempt to hang him he had, as charged in the indictment, given informa-

tion to one W. J. Duncan, who is alleged in the indictment "to be a United States deputy marshal." This information was that Bradley Thornton, Thomas McEntyre, Charlie Hyde, and others, whose names appear in the indictment in the record, had been operating illicit distilleries. The district attorney of the United States for the northern district of Georgia, conceiving that the attempt to hang Worley and his subsequent murder was due to and caused by his giving this information, procured before the grand jury the two indictments appearing in the record against movants and others named therein. While there are two motions, yet as the cases differ only in the gravity of the charge and the extent to which they had proceeded in the circuit court, and as they can perhaps be more intelligently discussed together, it is proposed to do so. In the case of The United States *vs.* John M. Quarles and David M. Butler the indictment was demurred to, the demurrer sustained to the last two counts, and overruled as to the first four. There was then an arraignment, trial, verdict of guilty, motion in arrest of judgment, motion overruled, and sentence of the court to confinement of five years in the penitentiary.

In the case of McEntyre and Goble there was a demurrer and an order and judgment overruling the demurrer as to the first four counts and sustaining it as to the last two counts. Both indictments have thus been tested in the court below. The legal idea upon which the two rest is identically the same.

This idea is that Henry Worley when he reported to the "United States deputy marshal" the persons named in the indictment was in the exercise of a right and privilege guaranteed by the Constitution and laws of the United States within the meaning of sections 5508 and 5509 of the Revised Statutes of the United States, themselves a part of the act passed in 1870 known as the "enforcement act." In the one case the act done in pursuance of the conspiracy

was the hanging of Worley, this being an assault with intent to murder under the State laws and punishable by confinement in the penitentiary from one to ten years, the act done in pursuance of the conspiracy in the other case being the murder of Worley and punishable under the State law capitally unless recommended to mercy by the jury.

The contention on the part of the movants through their demurrers and motion in arrest in one of the cases in the court below and by their motion for *habeas corpus* in this Court was and is that the case is not cognizable in the courts of the United States, and that the holding in custody by the marshal of Quarles and Butler under sentence is without authority under the Constitution and laws of the United States, such sentence being the act of a court having no jurisdiction. As to McEntyre and Goble, the contention is that after having tested the indictment by demurrer the custody of them by the marshal is illegal because held only under color of indictment pending in a court without jurisdiction.

It was contended in the court below and is contended in this Court that the first four counts in the two indictments charge no offense against the United States. These are the only counts which were upheld by the circuit court. The last two counts in both indictments were demurred to and the demurrer sustained and hence are not involved in the motion here and are not discussed in this brief. It is submitted that these two are proper cases for the exercise of the jurisdiction of this Court on petition for writs of *habeas corpus*.

Reasons for Exercising Jurisdiction by Habeas Corpus in These Cases.

While since the act of 1891 Quarles and Butler are now entitled to a writ of error and McEntyre and Goble will be when their case goes to verdict, there are certain peculiar and exceptional circumstances which call for the exercise of jurisdiction in this proceeding.

One of the main reasons is that some twenty-five or thirty individuals are under indictment for this conspiracy in its two forms. Their trial will involve a large expense to the Government, and should it be eventually held that the case was beyond Federal jurisdiction the time, labor, and expense will have been wasted.

Numbers of these men are now in jail. They are poor, unable to employ counsel, and unable to pay expenses of a writ of error.

Another reason is should the Federal jurisdiction be denied the State courts would now be in a position, the witnesses all being alive and accessible, to proceed at once in the adjudication of the question as to the guilt of parties charged with this assault with intent to murder and with this murder. Pending the adjudication of the question of Federal jurisdiction these witnesses may disappear or die or may be seduced away by parties on one side or the other of the case. When the case is then turned over to the State courts they are in the situation of having a case without any means of arriving at the facts.

Another reason for settling this question of jurisdiction at this stage is that the question should be entirely eliminated from the further consideration either of a State or Federal court in the future. Should these parties be convicted and sentenced by the Federal court with jurisdiction

it would practically end this question. Should they be finally acquitted in the Federal courts for lack of jurisdiction they are subjected to a second trial for practically, though not legally, the same offense.

Another reason is the importance of the question. A number of cases in the Southern States depend upon this question and it is here disconnected from everything extraneous to the point involved and presented squarely and clean cut.

Another reason is that the Department of Justice of the United States as well as the movants desire that the point be now adjudicated, and counsel have joined in the following stipulation and agreement:

WASHINGTON, D. C., *April* 23, 1895.

In the cases of John M. Quarles, David Butler, James McEntyre, and John H. Goble, motions for leave to file petition for *habeas corpus* in the Supreme Court of the United States, it is requested by both sides that the Court should allow the petitions to be filed in those cases and pass upon the merits of the questions involved, and decide the same. It is further agreed that should the Court be of opinion that a writ of *habeas corpus* should issue, the issuing of a rule to show cause why it should not issue is hereby waived, and it is agreed that the Court be requested to decide the whole case on the motions for leave to file the petitions for the writ of *habeas corpus*.

W. C. GLENN,
Counsel for Movants.

HOLMES CONRAD,
Solicitor General.

ON THE MERITS.

Stated concisely, the question involved in these cases is this: Does an informer when he gives information as to a revenue violation to a deputy marshal exercise a right and privilege guaranteed by the Constitution and laws of the United States within the meaning of sections 5508 and 5509 of the Revised Statutes? It is respectfully submitted that he does not.

By reference to the Revised Statutes dealing with the internal-revenue system, it will be discovered that it contemplates that the collection and management of the internal revenue shall be in the hands of the Commissioner, collectors, deputy collectors, and revenue agents mentioned in the statutes. In certain cases they are authorized to take information on oath, and are required to deliver this information to the district attorney of the United States for purposes of prosecution. No system which provides for the creation of a class of informers or for their compensation or service or employment has any statutory recognition, much less creation. The only mention which I have been able to find is contained in the usual appropriation act, which appropriates a sum usually stated at from $35,000 to $50,000 to pay for information and detection of revenue violations. I am informed that there is a regulation by the Commissioner of Internal Revenue which authorizes the payment to informers by collectors and deputy collectors of $10 for each still reported to them. This amount is paid to the informer, and the collection district receives credit in the settlement of its accounts for that amount when a still is discovered through the means of this information.

So far as I am aware, this is the full extent to which this practice has ever been recognized even by regulation, and in this class of cases the information is given to those who are

by law chargeable with the enforcement of the internal-revenue laws.

Now, what is the position of marshals and deputy marshals of the United States? They are the officers of courts. Their business is to serve processes directed to them by the different courts of the United States. They are in no manner chargeable with the enforcement of the revenue laws, except when processes based upon its violations are placed in their hands for service. There is a statute, passed in 1891, which authorizes a marshal or deputy marshal to arrest a person whom he finds actually engaged in violating the law and take him before some judicial officer for the purpose of trial and examination.

This is only a re-enactment of the common-law authority for an officer to arrest for an actual violation of the law occurring in his presence. There is no statute authorizing any marshal or deputy marshal to assume the functions of a detector of crime and to receive informations either on oath or not on oath, and to trade with, hire, or employ a host of informers. A practice has grown up of marshals appointing a lot of men called deputy marshals, removable at their pleasure, who do in fact employ such informers and do trade with them, and upon the basis of the information thus received do have warrants sworn out and arrests made. The object is to make fees for the marshal's office of the particular district, and these deputies are paid a certain percentage of the amount of fees thus received by the marshal's office. It is submitted that this system has no basis of existence either from the nature of the marshal's office and duties or from any statutory requirement of the United States.

Now, if there be no duty incumbent upon the marshal or his deputy to receive such information and to act upon it, can there be any right in the legal sense to give such information? Does not the very existence of a right imply a correlative legal duty to submit to its exercise and a cor-

responding power on part of the person or authority appealed to to make the right effectual?

From these considerations, can it be said that when Worley made the report to W. J. Duncan that he was exercising a right and privilege within the meaning of this section?

It is further submitted that a right and privilege, unless it is granted and secured or granted or secured by the express terms of the Constitution or some statute of the United States, does not fall within the meaning of these sections. Where the existence of the United States Government in its various forms or modes of operation is the mere occasion of the exercise of something in the nature of the right or privilege, it is not sufficient. In Cruikshank's case, 92d U. S., 542, and *Ex parte* Yarborough, 110 U. S., p. 651, and United States *vs.* Wadcell, 112th U. S., p. 76; Baldwin *vs.* Franks, 120th U. S., p. 678, and Logan *vs.* The United States, 144th U. S., p. 263, and in Kemmler's case, 136th U. S., p. 436, this question has been considered. A special reference is made to the language of Chief Justice Fuller in Kemmler's case, where the nature of a right giving occasion for the exercise of Federal jurisdiction is defined. The conclusion from all these authorities is that the right must have received either constitutional or statutory recognition and be something more than the mere juxtaposition of an individual with some function of the Federal Government. Applying the principle of these cases to the cases now pending, does the act of informing without any statutory authority in the deputy marshal or statutory duty imposed upon him or statutory recognition of the status of Worley as an informer create any legal relation between himself and the Government of the United States of such a character as to invest the Federal courts with jurisdiction to punish persons even to the extent of capital conviction on his account? All of the other cases ever before this Court are readily distinguishable from these. The Yarborough case was one of the very cases contemplated by the original en-

forcement act of 1870 and grew out of the very circumstances which the act was intended to meet. The Waddell case turned upon the right of a citizen to make a homestead entry, which right owed its birth to a statute of the United States. The case of Logan stands upon the undisputed right constitutionally secured to every citizen of the United States and to every other person accused of crime in a Federal court to a trial by jury.

Is not the right claimed in this case the ordinary right of personal security, the protection of which has been left to the States? Is not the right not only the right of a citizen of the United States as such, but is it not equally the right of a citizen of a State as such, and even the right of an alien, to give the character of information which Worley is alleged to have given? It is most strenuously contended that no such right as that charged in this indictment can be the basis of Federal jurisdiction.

None of the cases in the circuit courts are parallel to or in point with this case. In the case of The United States *vs.* Patrick, before Justice Jackson, in Tennessee, the person assaulted and killed was an officer of the United States and in the service and employment of the United States. There is no allegation in the indictment and no pretense or claim that Worley was in the service or employment of the United States. An informer does not act from motives of patriotism or to see the law enforced, but from a pecuniary consideration to enure to himself. Can it be said that the selling of information which it is the duty of a good citizen to give is protected by section 5508 of the Revised Statutes?

In the case of The United States *vs.* Lancaster, before Judge Speer, in the southern district of Georgia, the right claimed was the right to sue in the Federal court. This right, which exists only because created by the Constitution and laws of the United States, is so clearly within the protection of the statute as not to require discussion.

The case presented here is a pioneer of its class, and if the

jurisdiction be sustained it will amount to saying that whatever a man does, whatever act he attempts which has even the remotest relation to the existence of the Federal Government or to which the existence of the Federal Government gives occasion, is sufficient ground for trial and condemnation in the Federal courts.

Jurisdiction based on motive is, to say the least of it, a dangerous idea, and no extension of such jurisdiction beyond the express words of the statute requiring it should be permitted. I do not take time to discuss the relative functions of the two governments in cases of this character. Most of the considerations presenting themselves on either side will readily occur to the members of the Court. The necessity of preserving intact the relative functions of the State and Federal governments and restricting the criminal jurisdiction of the Federal Government over criminal matters to that expressly covered it is insisted is the proper course.

The specific point involved here is free from authority on either side, but in a general way as presenting all of the legal positions involved and marking their limitations the Yarborough case, Waddell case, Cruikshank case, Kemmler's case, Baldwin *vs.* Franks, and the Logan case, hereinbefore referred to, and the cases cited in them are called to the attention of the Court.

No question arises in these cases on the counts based on section 5406, because a demurrer to those counts in both indictments was sustained.

W. C. GLENN,
Counsel for Movants.

ORIGINAL.

Supreme Court of the United States.

OCTOBER TERM, 1894.

MOTION OF JAMES McENTIRE AND JOHN H. GOBLE FOR LEAVE TO FILE PETITION FOR WRIT OF *HABEAS CORPUS*.

Statement, Brief, and Argument for Movants.

W. C. GLENN, AND
D. W. ROUNTREE,
Counsel for Movants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

ORIGINAL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1894.

MOTION OF JAMES McENTIRE AND JOHN H. GOBLE FOR LEAVE TO FILE PETITION FOR WRIT OF *HABEAS CORPUS*.

Statement, Brief, and Argument for Movants.

W. C. Glenn and D. W. Rountree, counsel for movants.

STATEMENT OF FACTS.

Henry Worley lived in Murray county, which is in the northern district of Georgia. On the — day of March, 1894, a party of masked men came to his house, took him out, carried him a number of miles, and endeavored to kill him by hanging. The attempt was unsuccessful. About two weeks thereafter, in April, 1894, while Worley was at work in his field, a party of men came to him and engaged him in conversation and assassinated him in his field. Prior to his assassination and the attempt to hang him he had, as charged in the indictment, given informa-

tion to one W. J. Duncan, who is alleged in the indictment "to be a United States deputy marshal." This information was that Bradley Thornton, Thomas McEntyre, Charlie Hyde, and others, whose names appear in the indictment in the record, had been operating illicit distilleries. The district attorney of the United States for the northern district of Georgia, conceiving that the attempt to hang Worley and his subsequent murder was due to and caused by his giving this information, procured before the grand jury the two indictments appearing in the record against movants and others named therein. While there are two motions, yet as the cases differ only in the gravity of the charge and the extent to which they had proceeded in the circuit court, and as they can perhaps be more intelligently discussed together, it is proposed to do so. In the case of The United States *vs.* John M. Quarles and David M. Butler the indictment was demurred to, the demurrer sustained to the last two counts, and overruled as to the first four. There was then an arraignment, trial, verdict of guilty, motion in arrest of judgment, motion overruled, and sentence of the court to confinement of five years in the penitentiary.

In the case of McEntyre and Goble there was a demurrer and an order and judgment overruling the demurrer as to the first four counts and sustaining it as to the last two counts. Both indictments have thus been tested in the court below. The legal idea upon which the two rest is identically the same.

This idea is that Henry Worley when he reported to the "United States deputy marshal" the persons named in the indictment was in the exercise of a right and privilege guaranteed by the Constitution and laws of the United States within the meaning of sections 5508 and 5509 of the Revised Statutes of the United States, themselves a part of the act passed in 1870 known as the "enforcement act." In the one case the act done in pursuance of the conspiracy

was the hanging of Worley, this being an assault with intent to murder under the State laws and punishable by confinement in the penitentiary from one to ten years, the act done in pursuance of the conspiracy in the other case being the murder of Worley and punishable under the State law capitally unless recommended to mercy by the jury.

The contention on the part of the movants through their demurrers and motion in arrest in one of the cases in the court below and by their motion for *habeas corpus* in this Court was and is that the case is not cognizable in the courts of the United States, and that the holding in custody by the marshal of Quarles and Butler under sentence is without authority under the Constitution and laws of the United States, such sentence being the act of a court having no jurisdiction. As to McEntyre and Goble, the contention is that after having tested the indictment by demurrer the custody of them by the marshal is illegal because held only under color of indictment pending in a court without jurisdiction.

It was contended in the court below and is contended in this Court that the first four counts in the two indictments charge no offense against the United States. These are the only counts which were upheld by the circuit court. The last two counts in both indictments were demurred to and the demurrer sustained and hence are not involved in the motion here and are not discussed in this brief. It is submitted that these two are proper cases for the exercise of the jurisdiction of this Court on petition for writs of *habeas corpus*.

Reasons for Exercising Jurisdiction by Habeas Corpus in These Cases.

While since the act of 1891 Quarles and Butler are now entitled to a writ of error and McEntyre and Goble will be when their case goes to verdict, there are certain peculiar and exceptional circumstances which call for the exercise of jurisdiction in this proceeding.

One of the main reasons is that some twenty-five or thirty individuals are under indictment for this conspiracy in its two forms. Their trial will involve a large expense to the Government, and should it be eventually held that the case was beyond Federal jurisdiction the time, labor, and expense will have been wasted.

Numbers of these men are now in jail. They are poor, unable to employ counsel, and unable to pay expenses of a writ of error.

Another reason is should the Federal jurisdiction be denied the State courts would now be in a position, the witnesses all being alive and accessible, to proceed at once in the adjudication of the question as to the guilt of parties charged with this assault with intent to murder and with this murder. Pending the adjudication of the question of Federal jurisdiction these witnesses may disappear or die or may be seduced away by parties on one side or the other of the case. When the case is then turned over to the State courts they are in the situation of having a case without any means of arriving at the facts.

Another reason for settling this question of jurisdiction at this stage is that the question should be entirely eliminated from the further consideration either of a State or Federal court in the future. Should these parties be convicted and sentenced by the Federal court with jurisdiction

it would practically end this question. Should they be finally acquitted in the Federal courts for lack of jurisdiction they are subjected to a second trial for practically, though not legally, the same offense.

Another reason is the importance of the question. A number of cases in the Southern States depend upon this question and it is here disconnected from everything extraneous to the point involved and presented squarely and clean cut.

Another reason is that the Department of Justice of the United States as well as the movants desire that the point be now adjudicated, and counsel have joined in the following stipulation and agreement:

WASHINGTON, D. C., *April* 23, 1895.

In the cases of John M. Quarles, David Butler, James McEntyre, and John H. Goble, motions for leave to file petition for *habeas corpus* in the Supreme Court of the United States, it is requested by both sides that the Court should allow the petitions to be filed in those cases and pass upon the merits of the questions involved, and decide the same. It is further agreed that should the Court be of opinion that a writ of *habeas corpus* should issue, the issuing of a rule to show cause why it should not issue is hereby waived, and it is agreed that the Court be requested to decide the whole case on the motions for leave to file the petitions for the writ of *habeas corpus*.

W. C. GLENN,
Counsel for Movants.

HOLMES CONRAD,
Solicitor General.

ON THE MERITS.

Stated concisely, the question involved in these cases is this: Does an informer when he gives information as to a revenue violation to a deputy marshal exercise a right and privilege guaranteed by the Constitution and laws of the United States within the meaning of sections 5508 and 5509 of the Revised Statutes? It is respectfully submitted that he does not.

By reference to the Revised Statutes dealing with the internal-revenue system, it will be discovered that it contemplates that the collection and management of the internal revenue shall be in the hands of the Commissioner, collectors, deputy collectors, and revenue agents mentioned in the statutes. In certain cases they are authorized to take information on oath, and are required to deliver this information to the district attorney of the United States for purposes of prosecution. No system which provides for the creation of a class of informers or for their compensation or service or employment has any statutory recognition, much less creation. The only mention which I have been able to find is contained in the usual appropriation act, which appropriates a sum usually stated at from $35,000 to $50,000 to pay for information and detection of revenue violations. I am informed that there is a regulation by the Commissioner of Internal Revenue which authorizes the payment to informers by collectors and deputy collectors of $10 for each still reported to them. This amount is paid to the informer, and the collection district receives credit in the settlement of its accounts for that amount when a still is discovered through the means of this information.

So far as I am aware, this is the full extent to which this practice has ever been recognized even by regulation, and in this class of cases the information is given to those who are

by law chargeable with the enforcement of the internal-revenue laws.

Now, what is the position of marshals and deputy marshals of the United States? They are the officers of courts. Their business is to serve processes directed to them by the different courts of the United States. They are in no manner chargeable with the enforcement of the revenue laws, except when processes based upon its violations are placed in their hands for service. There is a statute, passed in 1891, which authorizes a marshal or deputy marshal to arrest a person whom he finds actually engaged in violating the law and take him before some judicial officer for the purpose of trial and examination.

This is only a re-enactment of the common-law authority for an officer to arrest for an actual violation of the law occurring in his presence. There is no statute authorizing any marshal or deputy marshal to assume the functions of a detector of crime and to receive informations either on oath or not on oath, and to trade with, hire, or employ a host of informers. A practice has grown up of marshals appointing a lot of men called deputy marshals, removable at their pleasure, who do in fact employ such informers and do trade with them, and upon the basis of the information thus received do have warrants sworn out and arrests made. The object is to make fees for the marshal's office of the particular district, and these deputies are paid a certain percentage of the amount of fees thus received by the marshal's office. It is submitted that this system has no basis of existence either from the nature of the marshal's office and duties or from any statutory requirement of the United States.

Now, if there be no duty incumbent upon the marshal or his deputy to receive such information and to act upon it, can there be any right in the legal sense to give such information? Does not the very existence of a right imply a correlative legal duty to submit to its exercise and a cor-

responding power on part of the person or authority appealed to to make the right effectual?

From these considerations, can it be said that when Worley made the report to W. J. Duncan that he was exercising a right and privilege within the meaning of this section?

It is further submitted that a right and privilege, unless it is granted and secured or granted or secured by the express terms of the Constitution or some statute of the United States, does not fall within the meaning of these sections. Where the existence of the United States Government in its various forms or modes of operation is the mere occasion of the exercise of something in the nature of the right or privilege, it is not sufficient. In Cruikshank's case, 92d U. S., 542, and *Ex parte* Yarborough, 110 U. S., p. 651, and United States *vs.* Wadcell, 112th U. S., p. 76; Baldwin *vs.* Franks, 120th U. S., p. 678, and Logan *vs.* The United States, 144th U. S., p. 263, and in Kemmler's case, 136th U. S., p. 436, this question has been considered. A special reference is made to the language of Chief Justice Fuller in Kemmler's case, where the nature of a right giving occasion for the exercise of Federal jurisdiction is defined. The conclusion from all these authorities is that the right must have received either constitutional or statutory recognition and be something more than the mere juxtaposition of an individual with some function of the Federal Government. Applying the principle of these cases to the cases now pending, does the act of informing without any statutory authority in the deputy marshal or statutory duty imposed upon him or statutory recognition of the status of Worley as an informer create any legal relation between himself and the Government of the United States of such a character as to invest the Federal courts with jurisdiction to punish persons even to the extent of capital conviction on his account? All of the other cases ever before this Court are readily distinguishable from these. The Yarborough case was one of the very cases contemplated by the original en-

forcement act of 1870 and grew out of the very circumstances which the act was intended to meet. The Waddell case turned upon the right of a citizen to make a homestead entry, which right owed its birth to a statute of the United States. The case of Logan stands upon the undisputed right constitutionally secured to every citizen of the United States and to every other person accused of crime in a Federal court to a trial by jury.

Is not the right claimed in this case the ordinary right of personal security, the protection of which has been left to the States? Is not the right not only the right of a citizen of the United States as such, but is it not equally the right of a citizen of a State as such, and even the right of an alien, to give the character of information which Worley is alleged to have given? It is most strenuously contended that no such right as that charged in this indictment can be the basis of Federal jurisdiction.

None of the cases in the circuit courts are parallel to or in point with this case. In the case of The United States *vs.* Patrick, before Justice Jackson, in Tennessee, the person assaulted and killed was an officer of the United States and in the service and employment of the United States. There is no allegation in the indictment and no pretense or clair that Worley was in the service or employment of the United States. An informer does not act from motives of patriotism or to see the law enforced, but from a pecuniary consideration to enure to himself. Can it be said that the selling of information which it is the duty of a good citizen to give is protected by section 5508 of the Revised Statutes?

In the case of The United States *vs.* Lancaster, before Judge Speer, in the southern district of Georgia, the right claimed was the right to sue in the Federal court. This right, which exists only because created by the Constitution and laws of the United States, is so clearly within the protection of the statute as not to require discussion.

The case presented here is a pioneer of its class, and if the

jurisdiction be sustained it will amount to saying that whatever a man does, whatever act he attempts which has even the remotest relation to the existence of the Federal Government or to which the existence of the Federal Government gives occasion, is sufficient ground for trial and condemnation in the Federal courts.

Jurisdiction based on motive is, to say the least of it, a dangerous idea, and no extension of such jurisdiction beyond the express words of the statute requiring it should be permitted. I do not take time to discuss the relative functions of the two governments in cases of this character. Most of the considerations presenting themselves on either side will readily occur to the members of the Court. The necessity of preserving intact the relative functions of the State and Federal governments and restricting the criminal jurisdiction of the Federal Government over criminal matters to that expressly covered it is insisted is the proper course.

The specific point involved here is free from authority on either side, but in a general way as presenting all of the legal positions involved and marking their limitations the Yarborough case, Waddell case, Cruikshank case, Kemmler's case, Baldwin *vs.* Franks, and the Logan case, hereinbefore referred to, and the cases cited in them are called to the attention of the Court.

The question arises in these cases on the counts based on section 5406, because a demurrer to those counts in both indictments was sustained.

W. C. GLENN,
Counsel for Movants.

Supreme Court of the United States.

OCTOBER TERM, 1894.

JAMES A. McENTIRE and JOHN H. GOBLE. } *Ex Parte.*

JOHN M. QUARLES, SR., and DAVID BUTLER. } *Ex Parte.*

BRIEF FOR THE UNITED STATES.

HOLMES CONRAD,
Solicitor General.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1894.

JAMES A. McENTIRE and JOHN H. GOBLE, *Ex Parte.*

JOHN M. QUARLES, SR., and DAVID BUTLER, *Ex Parte.*

BRIEF FOR THE UNITED STATES.

These are applications by the petitioners for leave to file their respective petitions for writs of *habeas corpus.*

It is stipulated between counsel for petitioners and the Solicitor General that the petitions be treated as filed and the causes submitted on the merits of the cases presented in the petitions. (Rec., p. 5.)

THE CASE.

The petitioners were indicted jointly with others at the March term, 1895, of the circuit court for the northern district of Georgia for conspiring to—

Injure, oppress, threaten, and intimidate one Henry Worley, a citizen of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States and because of his having exercised the same, in that he, the said Henry Worley, on the 19th of March, 1894, had reported to and

informed W. J. Duncan, a United States deputy marshal in and for the said northern district of Georgia, that Bradley Thornton and Thomas McEntire did, on the 15th of February, 1894, within said district, violate the internal-revenue law of the United States by carrying on the business of a distiller without having given the bond required by law; * * * and in furtherance of said conspiracy so formed as aforesaid and for the purpose aforesaid and to effect the object thereof the said * * * on the 7th day of April, 1894, did then and there, within said district and within the jurisdiction of said court, in the night-time and in disguise, go to the home of Henry Worley, * * * and did then and there take him, the said Henry Worley, from his house, and did beat, bruise, and otherwise ill-treat him, the said Henry Worley, and did then and there hang him, the said Henry Worley, by the neck, and did then and there shoot at him, the said Henry Worley, with guns and pistols loaded with powder and leaden balls, the same being weapons likely to produce death, because he, the said Henry Worley, had reported to W. J. Duncan, deputy marshal as aforesaid, one Thomas McEntire and Bradley Thornton for having violated the internal-revenue laws of the United States. * * *

The first four counts in the indictment are alike, except as to the person against whom the information was given. These counts were demurred to by defendants, but the demurrer was overruled.

In the brief of counsel for petitioners will be found a statement of the grounds relied on here to sustain the prayer of the petition. It is assumed in the brief and in the petition that the four counts in the indictment are on sections 5508 and 5509, Revised Statutes.

Section 5508 is as follows:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States or because of his having exercised the same, or if two or more persons go in disguise on the highway or on the premises of another with intent to prevent or hinder his free exercise or enjoyment

of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office or place of honor, profit, or trust created by the Constitution and laws of the United States.

Section 5407 provides—

If two or more persons in any State or Territory conspire for the purpose of impeding, hindering, obstructing, or defeating in any manner the due course of justice in any State or Territory with intent to deny to any citizen equal protection of the laws or to injure him or his property for lawfully enforcing or attempting to enforce the right of any person or class of persons to the equal protection of the laws, each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment.

The application here is for writs of *habeas corpus* to take petitioners out of the custody of the United States marshal for the northern district of Georgia and from the jurisdiction of the United States circuit court on the ground that the indictment upon which petitioners have been arraigned charges against them no offense under the laws of the United States.

The demurrer to the indictment (Rec., p. 18) was urged upon five distinct grounds, as follows:

1. Because in said indictment there is no allegation that William J. Duncan was an officer of the United States and charged with the enforcement of the internal-revenue laws, nor is there any allegation that said William J. Duncan was authorized to take information upon such subject as to employ persons for the service of the United States.
2. Because there is no allegation that Henry Worley was in the service or employment of the United States.
3. Because there is no such official as a United States deputy marshal, as charged in the indictment.
4. Because there is no such right and privilege secured by

the Constitution and laws of the United States, within the meaning of sections 5508 and 5509 of the Revised Statutes of the United States, as that set out in the indictment.

5. Because there is no crime or offense charged in the said bill of indictment of which the courts of the United States have jurisdiction.

In his brief (p. 6) counsel states the entire objection as follows:

Stated concisely, the question involved in these cases is this: Does an informer, when he gives information as to a revenue violation to a deputy marshal, exercise a right and privilege guaranteed by the Constitution and laws of the United States within the meaning of sections 5508 and 5509 of the Revised Statutes? It is respectfully submitted that he does not.

ARGUMENT.

Although the framer of this indictment may have had sections 5508 and 5509 in his mind when the indictment was drawn, yet the Court is not confined to these. If the charge contained in the indictment constitutes an offense under any law of the United States, the accused may be properly convicted.

Counsel errs in his impression that "no system which provides for the creation of a class of informers or for their compensation or service or employment has any statutory recognition, much less creation." It has both "statutory recognition and creation."

Section 3463, Revised Statutes, provides that the Commissioner of Internal Revenue is authorized to pay such sums as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws or conniving at the same in cases where such expenses are not otherwise provided for by law.

The act of June 22, 1874 (18 Stat., 186, chap. 391, Sup. Rev. Stat.) makes specific and ample provision for the em-

ployment and pay of informers of the violation of the customs and revenue laws.

Again counsel is in error in his assumption that the duties of deputy marshal are confined merely to serving process, and that "they are in no manner chargeable with the enforcement of the revenue laws except when processes based upon its violation are placed in their hands for service."

Section 780, Revised Statutes, provides for the appointment of deputy marshals, who are removable from office only by the judge of the circuit or district court.

Section 1982, Revised Statutes, requires deputy marshals "to institute prosecutions against all persons violating any of the provisions of chapter 7 of the title 'crimes,' and to cause such persons to be arrested and imprisoned or bailed for trial before the court of the United States or the territorial court having cognizance of the offense."

IT IS THE "RIGHT AND PRIVILEGE" OF EVERY CITIZEN OF THE UNITED STATES TO GIVE INFORMATION OF ANY VIOLATION OF THE LAWS OF THE UNITED STATES WHICH MAY COME TO HIS KNOWLEDGE IN ORDER TO THE CONVICTION AND PUNISHMENT OF THE OFFENDER.

Not only is it the right and privilege but it is the duty of every member of the civil community to afford the information and to render the assistance which may be required for the maintenance and enforcement of the laws by which that community is governed.

In many cases this social obligation has been made a legal obligation by positive statute.

At common law it was the duty of every subject to pursue and take a felon and to raise the hue and cry.

1 Hale, Pleas of the Crown, 593–'4.

2 Hale, 76.

2 Hawkins, Pleas of the Crown, 115–'16.

2 Blackstone, Book 4, p. 293.

In the case of treason it is made the duty of every person, by express statute, to disclose and make known the commission of any treason against the United States which may come to his knowledge.

It is true that the right of any person to be a witness and to attend court for the purpose of giving his testimony was held by Mr. Justice Lamar in *United States vs. Sanges*, 48 Fed. Rep., 87, not to be a right granted by the Constitution.

But the charge laid in the indictment here is not for the intimidation or punishment of one because of his being a witness in the United States court, but because of his having exercised the right and privilege secured to him by the Constitution and laws of the United States of reporting to and informing a deputy marshal of the United States of the violation by certain persons in order to the prosecution, conviction, and punishment of such offenders.

The question presented being whether giving such information and making such report with the view and for the purpose stated was a right and privilege which the person so acting derived under the Constitution and laws of the United States.

The internal-revenue laws are enacted by the Congress of the United States only.

The courts of the United States alone have jurisdiction of cases on information or indictment for the violation of these laws.

The law officers of the Government and the grand juries in the Federal courts can proceed by information or indictment only upon facts that are brought to their knowledge.

The contention of petitioners appears to be that if such law officers or members of the grand jury have not personal knowledge of the facts that it is not the right and privilege of a private citizen to bring such facts to their knowledge; that there is no moral or social obligation resting upon him to do so.

It cannot be denied that this duty is not imposed by posi-

tive statute in all cases, so that its violation would subject the delinquent to penalties.

It is true in the case of treason that by section 5333, Revised Statutes, every person owing allegiance to the United States and having knowledge of the commission of any treason against them who conceals and does not disclose it is guilty of misprision of treason and exposed to penalties. There a distinct legal duty is laid upon the citizen to inform of the treason which has come to his knowledge. For his failure to perform this duty he may be punished.

But, aside from the statute which creates the legal duty, can it be denied that the citizen has a legal right as well as a moral duty to disclose and make known every flagrant violation of law which may come to his knowledge?

As a citizen of a State he has and may exercise this right when the laws of the State are violated. As a citizen of the United States his right is the same as to the violation of their laws.

If this right did not exist, then would every citizen, although actuated by the purest and most patriotic motives, who might convey to law officers or to grand jury information of offenses against the law be himself held liable in a prosecution for slander, or, if such information was given by publication in the newspapers, be punished for libel?

In *Worthington vs. Scribner et al.*, 109 Mass., 487, the declaration charged that the defendants had falsely represented to the Treasury Department of the United States that the plaintiff was importing books into the United States in fraud of the United States revenue.

The defendants plead that if the charge was true, yet that such information was a privileged communication.

Mr. Justice Gray, speaking for the Court, said:

> It is the duty of every citizen to communicate to his Government any information which he has of the commission of an offense against its laws.

In *Davies vs. Snead*, Law Reports, 5 Q. B., 611, Blackburn, J., said:

Where a person is so situated that it becomes right, in the interest of society, that he should tell to a third person certain facts, then, if he *bona fide* and without malice does tell them, it is a privileged communication.

In *Harrison vs. Bush*, 5 El. and Bl., 349, it was said that the word "duty" cannot be confined to legal duties, which may be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation.

In Townsend on Slander and Libel, 4th ed., sec. 35, the author, commenting upon the last-named case, says:

We hear of moral and social duties of imperfect obligation, but there is no such thing as a duty of imperfect obligation. What is so denominated is really a right, a right which should be exercised, which, as in the case of all rights, the person in whom it is vested may or may not exercise at his option.

See, too, opinion of Justice Blatchford in *Vogel, Executor, vs. Gruaz*, 110 U. S., 311.

It being then the right and the moral duty of Henry Worley to give the information and disclose to the Government the facts within his knowledge, the other question arises, Was this a right derived from or secured by the Constitution and laws of the United States?

In *Ex parte Yarbrough*, 110 U. S., 662, Mr. Justice Miller, speaking for this Court, said:

It is said that the parties assaulted in these cases are not officers of the United States, and their protection, in exercising the right to vote, by Congress, does not stand on the same ground.

But the distinction is not well taken. The power in either case arises out of the circumstance that the function in which

the party is engaged or the right which he is about to exercise is dependent on the laws of the United States.

In both cases it is the duty of that Government to see that he may exercise this right freely and to protect him from violence while so doing or on account of so doing.

This duty does not arise solely from the interest of the party concerned, but from the necessity of the Government itself that its service shall be free from the adverse influence of force and fraud practiced on its agents.

It is evident here that the function in which the party was engaged or the right which he was exercising were dependent on the laws of the United States. It was a violation of the internal-revenue laws of the United States that he gave information.

It was only as a citizen of the United States that he held the right to give the information which would lead to the vindication of those laws by the conviction and punishment of their violator.

As a citizen of the State of Georgia, he had no sort of interest or concern in the existence or administration of these Federal statutes.

This right, as we have already seen, is clearly recognized and distinctly provided for in those acts of Congress respecting the compensation to be paid persons giving information of the violation of internal-revenue laws and of the customs revenue laws.

In *Logan vs. United States*, 144 U. S., 281, Mr. Justice Gray reviews the cases and enforces the distinction between those in which the right is secured to the citizen by the Constitution and laws of the United States and those in which the right can be vindicated only under the laws of the several States.

Tried by the tests and rules indicated in that opinion, we think it will be found that the right which Henry Worley had exercised, and for the exercise of which he was assaulted by these petitioners, was one which did not exist and could

not have existed except under and by reason of the internal-revenue laws of the United States, in the maintenance and enforcement of which he, as a citizen of the United States, was interested, and because of such citizenship it was his duty to afford the information which would lead to the vindication of these laws, and being his duty it was equally his right; and for the exercise of this right he was punished.

The indictment, it will be observed, distinctly charges that W. J. Duncan was the United States deputy marshal. That the petitioners did kill Henry Worley "because the said Henry Worley, in the exercise of the rights and privileges secured to him by the Constitution and laws aforesaid, had reported to W. J. Duncan, a United States deputy marshal, Bradley Thornton and Thomas McEntire for having violated the internal-revenue laws of the United States, as aforesaid" (p. 2, Rec.).

Attention has been called to the grounds of demurrer to the indictment set forth above. Many of these grounds might avail on writ of error, but cannot be considered here.

The writ of *habeas corpus* is not a proceeding for the correction of errors.

In re Frederich, petitioner, 149 U. S., 75, and cases cited.

That W. J. Duncan, the United States deputy marshal, was not an internal-revenue officer could afford no ground of defense in the prosecution on the indictment and cannot avail the petitioners in their application for *habeas corpus* here.

We have seen that by section 1982, Revised Statutes, it was made the duty of deputy marshals "to institute proceedings against all persons violating any of the provisions

of chapter 7 of the title of "crimes," a chapter which relates to the crimes against the civil rights of citizens.

Even if it be true that the information was not given to such an officer of the Government as would entitle the informer to recover the reward allowed by the statute for information (see "informers," A. & E. Ency.), yet still it was information given in good faith and from right motives, by a citizen of the United States in the lawful exercise of a right and duty, in order to the maintenance of their laws.

HOLMES CONRAD,
Solicitor General.

Supreme Court of the United States.

OCTOBER TERM, 1894.

EX PARTE.

JOHN M. QUARLES, SR., AND DAVID BUTLER.

Reply Brief of Petitioners in Reply to Brief of Solicitor General, for the United States.

W. C. GLENN,
D. W. ROUNTREE,
Counsel for Movants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1894.

EX PARTE.

JOHN M. QUARLES, SR., AND DAVID BUTLER.

Reply Brief of Petitioners in Reply to Brief of Solicitor General, for the United States.

Quoting from the language of the brief for the United States, on page 2:

"In the brief of counsel for petitioners will be found a statement of the grounds relied on here to sustain the prayer of the petition. It is assumed in the brief and in the petition that the four counts in the indictment are on sections 5508 and 5509, Revised Statutes."

The only other section to which the Solicitor General calls attention is section 5407 of the Revised Statutes. It is submitted that unless these indictments be upheld under sections 5508 and 5509 they must fall, and that section 5407 has no application for two reasons:

1st. Because there are no charges or allegations in the indictment which can in any way bring these cases within the language or meaning of that section. There is no pre-

tense of any act done to hinder the course of justice in the State or Territory with the intent required by that section, or to injure any one in his person or property for lawfully enforcing or attempting to enforce the right of any person to the equal protection of the law.

2nd. Even if this were true and these indictments apply framed to charge an offense within the language and meaning of that section, it is conceived that the section is not constitutional for general reasons not requiring statement, and because the point is fully covered in principle, if not in terms, by the decision of this Court in The U. S. *vs.* Harris, 106 U. S., p. 629. All of these statutes undertaking to legislate directly grew out of the peculiar circumstances of the time when passed, and were supposed to be necessary to protect the rights of a class of people whose citizenship had been recently conferred. The warrant for their enactment was supposed to rest upon the recent amendments to the Constitution until the broad meaning those amendments were thought to bear was narrowed by the decisions of this Court. Reference is called in this connection not only on this particular point but upon the whole question involved. (Slaughter-house cases, 16 Wallace, p. —, and Civil Rights cases, 110 U. S., p. 1.)

On page 3 of the brief there is a slight error in speaking of the motion in arrest of judgment in the Quarles and Butler case as a demurrer. The demurrer on behalf of Quarles and Butler will be found on pages 14, 15, 16, and part of 17 in the record. The demurrer in behalf of McIntire and Goble will be found on pages 13, 14, 15, and 16 of the record in their case. The quotation is from neither of the demurrers. The point, however, is substantially stated the same in both forms.

The Court is not asked in this case to deal with any point arising either out of the two demurrers or out of the motion

in arrest of judgment in the Quarles and Butler case, which set up mere error in the proceedings. The rule to the contrary is too well settled, and it is conceded that if these petitioners are charged with an offense, no matter how erroneously stated, no matter if the demurrer should have been sustained, unless the trouble amounts to a jurisdictional defect, is to be considered. The contention broadly is that there is no offense charged against the United States in either of the four counts in the indictments which were held by the court below.

INFORMERS.

It is believed that counsel for the Government errs as to the statutory creation and status of informers in internal-revenue cases, and that this error arises from his having confounded the methods of two distinct systems of revenue. The act of 1874, 18th Statute, p. 186, chap. 391, cited by him, relates to the customs revenue and has no relevancy to the point contended for by him and is no reply to the assertion which was made by the internal-revenue cases. The title of the act is "An act to amend the customs revenue and to repeal moities." The act is an elaborate one and goes into many matters connected with the customs revenue, but has no relation whatever to the system of internal revenue.

Nor is the citation of section 1982 of the Revised Statutes more apposite. Chapter 7 of the title "crimes" in Revised Statutes comprehends crimes against the elective franchise and civil rights of citizens. They are not revenue statutes, and they are not enactments made for the benefit of the Government; nor do they subserve except in an indirect way through the protection of citizens any function of the Federal Government. The legislation mainly is directed against the acts of individuals and was intended to protect the rights of other individuals. The old order had changed; a new class of citizens had been created; new rights had been conferred; new

means for their protection were necessary; new safeguards were invoked. The surroundings were of such character and the people upon whom these rights had been conferred were largely helpless in contact with a superior and dominant race, unfurnished with experience or with that grossly material but vitally necessary sinew of litigation—money—to protect themselves. Conferring rights and remedies was felt of itself to be insufficient, and in order to make those effectual these officials of the Government named in section 1982 were not only authorized but directed to institute prosecution. Fortunately for the country, that period was transitory, and this legislation has by the improved order of things been relegated to that large legal junk shop of wasted and unused legislation. The statute has no sort of relation to the point involved in this case. With deference to the learned Solicitor General the assertion is reiterated that in internal-revenue cases and in internal-revenue matters informers as a class have neither statutory recognition nor statutory creation, and that deputy marshals of the United States are not by statute authorized or required to institute prosecution, to assume the ferreting out and detection of crime in this class of cases. Surely it would be a remarkable result that a deputy marshal could by assuming duties not incumbent upon him, or by encouraging informers, not required by law, for fees and rewards to be paid to those informers, but confer upon the Federal courts a criminal jurisdiction of so vast an extent as would result logically and necessarily from the position of the Government in this case. All of the removal acts ever passed by Congress would not be so powerful in taking matters from State to Federal jurisdiction as these acts of deputy marshals.

Section 780 of the Revised Statutes does provide for appointment of deputy marshals, removable by the circuit court and the district court. These officials have a recognized statutory position. In practice, however, the men

called deputy marshals—that is, a large majority of them—are appointed by the marshal under contract, and are removable at his pleasure, and are paid a percentage of the fees resulting from cases brought by them into the marshal's office. These are the men who trade with the informers. These are the men who assume detection of crime against the revenue laws and who are acting not from motives of enforcing law, but are controlled solely by the desire for fees. Though it is not involved in this case, I mention as an illustration that W. J. Duncan, the so-called U. S. deputy marshal, was shown upon the trial of Quarles and Butler by the commission under which he purported to act to have been appointed during the will and pleasure of the marshal. He was never sworn before the district judge, nor was any affidavit ever certified to the district judge. A short while after his appointment it was canceled by the marshal, the district judge at no time having had any official notice either of Duncan's appointment or removal It is submitted that this is an *excrescence*, a fungus growth upon the internal-revenue system of the country.

That it is the right and privilege of any citizen to aid in the enforcement of the laws, State and Federal, in the proper sense of those terms, is broadly conceded. This right and privilege and duty, even, existed prior to, did not grow out of, and is in no way, manner, or form, either historically or legally, the product of the Constitution and laws of the United States. As to such acts affording a justification in libel and slander suits, that concession is also made. It is submitted that that is not the point involved in this case. Take, for instance, the language of Mr. Justice Gray in Worthington *vs.* Scribner, 109 Mass., 487, cited by the Solicitor General. That case would have been in point if the defendants had sought to remove the case into the circuit court of the United States upon the ground that they were exercising a Federal right and privilege, and acting under authority derived from the Constitu-

tion and laws of the United States, and such right of removal had been upheld. The question here is not as to the extent, nature, or character of the right, nor the scope of its protection, but whether or not such things or rights are within the meaning of the sections 5508 and 5509, so as to make the violator of them amenable to criminal jurisdiction of the Federal Government. It is submitted that the mere doing of something which brings an individual into contact with some official or function of the National Government is not the case contemplated by those sections. It might be conceded that Congress, by appropriate legislation, could do so; the contention here is that by these sections they have not done so.

On page 9 of the Solicitor General's brief I find this language:

"It was only as a citizen of the United States that he held the right to give the information which would lead to the vindication of those laws by the conviction and punishment of their violator.

"As a citizen of the State of Georgia, he had no sort of interest or concern in the existence or administration of these Federal statutes."

I do not so understand our system of Government. The Constitution and laws made in pursuance thereof are the supreme laws of the land. The officials of the States are sworn to support and defend it. A citizen, whether of the United States as such or of the States as such, has the highest interest and concern in the existence and administration of the Federal statutes. These systems are not foreign to each other; they are complementary, each filling in the interstices of the other and occasionally overlapping. The two combined are the law of the land, each system having its appropriate function and each chargeable with the duties incumbent upon it in the general scheme of our Federo-National Government. It is a Government neither wholly Federal nor wholly

National, but a combination of the two—a commixture of elements derived from both sources and operating in the sustaining of each by the other. I hope the somewhat illegitimate compound "Federo-National" may be pardoned. In the language of Chief Justice Waite, in Cruikshank's case, "Sovereignty for the protection of life and property was originally placed in the State, and it remains there." I yield to none in the strength of my sentiment of nationality. I believe in the imperial destiny of this country. The Constitution of the United States is to me that instrument as interpreted by this Court. It rests upon solid ground. It touches the individual. It has its source in the people of the United States. The Federal Government not only can but ought to protect its own functions, protect its citizens as such in the exercise of all the rights which the Constitution and laws passed in pursuance thereof have conferred upon the people of this country. I belong to that generation of the younger element of the South to whom the construction placed upon the Constitution by the politicians of the past is a mere matter of the history of a phase of opinion which has disappeared. While this is true, I at the same time believe that I am carrying out the real spirit of its founders and the real intention of that instrument to ask this Court to equally respect the principle of local self-government and to maintain in this case, as it has in the past, with equal integrity, the functions of the State governments as well as that of the National. In the language of Chief Justice Chase, in Texas *vs.* White, the preservation of the States with their due powers and responsibilities is as much within the scope and design of the Constitution as that of the Union. Unwarrantable assumptions of jurisdiction on the part of either are to be sternly repressed by the judiciary.

I regard this case as a very important one, not only to these petitioners personally, but to the people of the country at large. This importance springs not so much from the

importance of the mere point decided as it does from the importance of the underlying ideas, general reasoning, conclusion, and necessary result lying back of and involved in the assumptions upon which the jurisdiction must be upheld in this case.

It is respectfully submitted that the argument of the Solicitor General does not meet the questions at issue, and that the jurisdiction to proceed in the manner contemplated in this case must be denied, and that the prayer of the petitioners for the issuing of the writ of *habeas corpus* in these cases should be granted.

W. C. GLENN,
Counsel for Movants.

Supreme Court of the United States.

OCTOBER TERM, 1894.

EX PARTE.

JAMES A. McENTIRE AND JOHN H. GOBLE.

Reply Brief of Petitioners in Reply to Brief of Solicitor General, for the United States.

W. C. GLENN,
D. W. ROUNTREE,
Counsel for Movants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1894.

EX PARTE.

JAMES A. McENTIRE AND JOHN H. GOBLE.

Reply Brief of Petitioners in Reply to Brief of Solicitor General, for the United States.

Quoting from the language of the brief for the United States, on page 2:

"In the brief of counsel for petitioners will be found a statement of the grounds relied on here to sustain the prayer of the petition. It is assumed in the brief and in the petition that the four counts in the indictment are on sections 5508 and 5509, Revised Statutes."

The only other section to which the Solicitor General calls attention is section 5407 of the Revised Statutes. It is submitted that unless these indictments be upheld under sections 5508 and 5509 they must fall, and that section 5407 has no application for two reasons:

1st. Because there are no charges or allegations in the indictment which can in any way bring these cases within the language or meaning of that section. There is no pre-

tense of any act done to hinder the course of justice in the State or Territory with the intent required by that section, or to injure any one in his person or property for lawfully enforcing or attempting to enforce the right of any person to the equal protection of the law.

2nd. Even if this were true and these indictments apply framed to charge an offense within the language and meaning of that section, it is conceived that the section is not constitutional for general reasons not requiring statement, and because the point is fully covered in principle, if not in terms, by the decision of this Court in The U. S. *vs.* Harris, 106 U. S., p. 629. All of these statutes undertaking to legislate directly grew out of the peculiar circumstances of the time when passed, and were supposed to be necessary to protect the rights of a class of people whose citizenship had been recently conferred. The warrant for their enactment was supposed to rest upon the recent amendments to the Constitution until the broad meaning those amendments were thought to bear was narrowed by the decisions of this Court. Reference is called in this connection not only on this particular point but upon the whole question involved. (Slaughter-house cases, 16 Wallace, p. —, and Civil Rights cases, 110 U. S., p. 1.)

On page 3 of the brief there is a slight error in speaking of the motion in arrest of judgment in the Quarles and Butler case as a demurrer. The demurrer on behalf of Quarles and Butler will be found on pages 14, 15, 16, and part of 17 in the record. The demurrer in behalf of McIntire and Goble will be found on pages 13, 14, 15, and 16 of the record in their case. The quotation is from neither of the demurrers. The point, however, is substantially stated the same in both forms.

The Court is not asked in this case to deal with any point arising either out of the two demurrers or out of the motion

in arrest of judgment in the Quarles and Butler case, which set up mere error in the proceedings. The rule to the contrary is too well settled, and it is conceded that if these petitioners are charged with an offense, no matter how erroneously stated, no matter if the demurrer should have been sustained, unless the trouble amounts to a jurisdictional defect, is to be considered. The contention broadly is that there is no offense charged against the United States in either of the four counts in the indictments which were held by the court below.

INFORMERS.

It is believed that counsel for the Government errs as to the statutory creation and status of informers in internal-revenue cases, and that this error arises from his having confounded the methods of two distinct systems of revenue. The act of 1874, 18th Statute, p. 186, chap. 391, cited by him, relates to the customs revenue and has no relevancy to the point contended for by him and is no reply to the assertion which was made by the internal-revenue cases. The title of the act is "An act to amend the customs revenue and to repeal moities." The act is an elaborate one and goes into many matters connected with the customs revenue, but has no relation whatever to the system of internal revenue.

Nor is the citation of section 1982 of the Revised Statutes more apposite. Chapter 7 of the title "crimes" in Revised Statutes comprehends crimes against the elective franchise and civil rights of citizens. They are not revenue statutes, and they are not enactments made for the benefit of the Government; nor do they subserve except in an indirect way through the protection of citizens any function of the Federal Government. The legislation mainly is directed against the acts of individuals and was intended to protect the rights of other individuals. The old order had changed; a new class of citizens had been created; new rights had been conferred; new

means for their protection were necessary; new safeguards were invoked. The surroundings were of such character and the people upon whom these rights had been conferred were largely helpless in contact with a superior and dominant race, unfurnished with experience or with that grossly material but vitally necessary sinew of litigation—money—to protect themselves. Conferring rights and remedies was felt of itself to be insufficient, and in order to make those effectual these officials of the Government named in section 1982 were not only authorized but directed to institute prosecution. Fortunately for the country, that period was transitory, and this legislation has by the improved order of things been relegated to that large legal junk shop of wasted and unused legislation. The statute has no sort of relation to the point involved in this case. With deference to the learned Solicitor General the assertion is reiterated that in internal-revenue cases and in internal-revenue matters informers as a class have neither statutory recognition nor statutory creation, and that deputy marshals of the United States are not by statute authorized or required to institute prosecution, to assume the ferreting out and detection of crime in this class of cases. Surely it would be a remarkable result that a deputy marshal could by assuming duties not incumbent upon him, or by encouraging informers, not required by law, for fees and rewards to be paid to those informers, but confer upon the Federal courts a criminal jurisdiction of so vast an extent as would result logically and necessarily from the position of the Government in this case. All of the removal acts ever passed by Congress would not be so powerful in taking matters from State to Federal jurisdiction as these acts of deputy marshals.

Section 780 of the Revised Statutes does provide for appointment of deputy marshals, removable by the circuit court and the district court. These officials have a recognized statutory position. In practice, however, the men

called deputy marshals—that is, a large majority of them—are appointed by the marshal under contract, and are removable at his pleasure, and are paid a percentage of the fees resulting from cases brought by them into the marshal's office. These are the men who trade with the informers. These are the men who assume detection of crime against the revenue laws and who are acting not from motives of enforcing law, but are controlled solely by the desire for fees. Though it is not involved in this case, I mention as an illustration that W. J. Duncan, the so-called U. S. deputy marshal, was shown upon the trial of Quarles and Butler by the commission under which he purported to act to have been appointed during the will and pleasure of the marshal. He was never sworn before the district judge, nor was any affidavit ever certified to the district judge. A short while after his appointment it was canceled by the marshal, the district judge at no time having had any official notice either of Duncan's appointment or removal It is submitted that this is an *excrescence*, a fungus growth upon the internal-revenue system of the country.

That it is the right and privilege of any citizen to aid in the enforcement of the laws, State and Federal, in the proper sense of those terms, is broadly conceded. This right and privilege and duty, even, existed prior to, did not grow out of, and is in no way, manner, or form, either historically or legally, the product of the Constitution and laws of the United States. As to such acts affording a justification in libel and slander suits, that concession is also made. It is submitted that that is not the point involved in this case. Take, for instance, the language of Mr. Justice Gray in Worthington *vs.* Scribner, 109 Mass., 487, cited by the Solicitor General. That case would have been in point if the defendants had sought to remove the case into the circuit court of the United States upon the ground that they were exercising a Federal right and privilege, and acting under authority derived from the Constitu-

tion and laws of the United States, and such right of removal had been upheld. The question here is not as to the extent, nature, or character of the right, nor the scope of its protection, but whether or not such things or rights are within the meaning of the sections 5508 and 5509, so as to make the violator of them amenable to criminal jurisdiction of the Federal Government. It is submitted that the mere doing of something which brings an individual into contact with some official or function of the National Government is not the case contemplated by those sections. It might be conceded that Congress, by appropriate legislation, could do so; the contention here is that by these sections they have not done so.

On page 9 of the Solicitor General's brief I find this language:

"It was only as a citizen of the United States that he held the right to give the information which would lead to the vindication of those laws by the conviction and punishment of their violator.

"As a citizen of the State of Georgia, he had no sort of interest or concern in the existence or administration of these Federal statutes."

I do not so understand our system of Government. The Constitution and laws made in pursuance thereof are the supreme laws of the land. The officials of the States are sworn to support and defend it. A citizen, whether of the United States as such or of the States as such, has the highest interest and concern in the existence and administration of the Federal statutes. These systems are not foreign to each other; they are complementary, each filling in the interstices of the other and occasionally overlapping. The two combined are the law of the land, each system having its appropriate function and each chargeable with the duties incumbent upon it in the general scheme of our Federo-National Government. It is a Government neither wholly Federal nor wholly

National, but a combination of the two—a commixture of elements derived from both sources and operating in the sustaining of each by the other. I hope the somewhat illegitimate compound "Federo-National" may be pardoned. In the language of Chief Justice Waite, in Cruikshank's case, "Sovereignty for the protection of life and property was originally placed in the State, and it remains there." I yield to none in the strength of my sentiment of nationality. I believe in the imperial destiny of this country. The Constitution of the United States is to me that instrument as interpreted by this Court. It rests upon solid ground. It touches the individual. It has its source in the people of the United States. The Federal Government not only can but ought to protect its own functions, protect its citizens as such in the exercise of all the rights which the Constitution and laws passed in pursuance thereof have conferred upon the people of this country. I belong to that generation of the younger element of the South to whom the construction placed upon the Constitution by the politicians of the past is a mere matter of the history of a phase of opinion which has disappeared. While this is true, I at the same time believe that I am carrying out the real spirit of its founders and the real intention of that instrument to ask this Court to equally respect the principle of local self-government and to maintain in this case, as it has in the past, with equal integrity, the functions of the State governments as well as that of the National. In the language of Chief Justice Chase, in Texas *vs.* White, the preservation of the States with their due powers and responsibilities is as much within the scope and design of the Constitution as that of the Union. Unwarrantable assumptions of jurisdiction on the part of either are to be sternly repressed by the judiciary.

I regard this case as a very important one, not only to these petitioners personally, but to the people of the country at large. This importance springs not so much from the

importance of the mere point decided as it does from the importance of the underlying ideas, general reasoning, conclusion, and necessary result lying back of and involved in the assumptions upon which the jurisdiction must be upheld in this case.

It is respectfully submitted that the argument of the Solicitor General does not meet the questions at issue, and that the jurisdiction to proceed in the manner contemplated in this case must be denied, and that the prayer of the petitioners for the issuing of the writ of *habeas corpus* in these cases should be granted.

W. C. Glenn,
Counsel for Movants.